82-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a Foreign Corporation,

Appellant,

vs

JOSEPH and BARBARA J. FALZON, Individually and as Next Friend of JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON and RAMON FALZON, Minors

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT AND APPENDIX

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LIST OF PARTIES TO PROCEEDING IN THE MICHIGAN COURTS

Those parties not listed in the above caption are: Home Insurance Company, Intervening Plaintiff, and Defendants Volkswagen Manufacturing Corporation of America, a Pennsylvania Corporation; Wood Motors, Inc., a Michigan Corporation; GMGH, a corporation; and Volkswagen of America, Incorporated, a New Jersey Corporation.

RULE 28, RULES OF THE SUPREME COURT

Notice is hereby given that 28 USC §2403(b) may be applicable. To the best of Appellant's knowledge no court has certified to the Attorney General of Michigan the fact that the constitutionality of the Michigan General Court Rules, as applied, has been drawn in question.

QUESTION PRESENTED BY THE APPEAL

HAVE THE MICHIGAN COURTS VIOLATED INTERNATIONAL COMITY, THE SUPREMACY CLAUSE OF THE CONSTITUTION AND THE PROVISIONS OF THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS BY ORDERING THAT DEPOSITIONS BE TAKEN OF GERMAN NATIONALS IN THE FEDERAL REPUBLIC OF GERMANY PURSUANT TO MICHIGAN COURT RULES?

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OPINIONS AND ORDERS BELOW

No opinion was rendered by the Supreme Court of Michigan. Rather, its Order Denying Emergency Leave to Appeal was entered February 22, 1983. (Appendix 1a). Nor did the Michigan Court of Appeals enter an opinion but, instead, denied emergency leave to appeal by Order, dated May 27, 1982. (Appendix 3a).

The opinions of the Circuit Court, County of Wayne, Michigan, are not reported. Copies of the Circuit Court Orders dated October 7, 1980, August 17, 1982 and April 15, 1983, appear in the Appendix at pages 24a, 7a and 4a.

As of the filing of this Appeal, the Supreme Court of Michigan has not acted on Appellant's Motion for Stay of a renewed Notice of Deposition.

This Court previously has had this matter before it on two occasions, each being an Application for Emergency Stay and each having been addressed by a single Justice. Chief Justice

Warren E. Burger, in response to the First Application, entered an Order on August 23, 1982, staying the orders of the Wayne County Circuit Court entered October 7, 1980 and August 17, 1982, "pending the final disposition of the appeals before the Michigan Supreme Court, case Nos. 69595 and 69596." (Appendix 30a). Justice Sandra Day O'Connor, in response to the Second Application, entered an Order on April 29, 1983, staying the same Wayne County Circuit Court Orders together with a new Notice of Deposition which would have compelled the depositions to go forward on May 2, 1983. Justice O'Connor's Stay Order remains in effect pending the disposition by the Michigan Supreme Court of Appellant's "Application for Emergency Stay" in that Court (Appendix 31a).

THE COURT'S JURISDICTIONAL GROUNDS

This is an Appeal from a final order of the Supreme Court of Michigan, dated February 22, 1983, denying emergency application for leave to appeal; thus confirming the Order of the Michigan Trial Court that the Michigan General Court Rules were to govern the taking of depositions, in Germany, of German nationals, in violation of the provisions of a Treaty existing between the United States and the Federal Republic of Germany (Convention on the Taking of Evidence Abroad in Civil or Commercial Matters) — all in contravention of German Sovereignty and internal law and the Supremacy Clause of the Constitution of the United States.

The Order of the Michigan Supreme Court sought to be reviewed is dated February 22, 1983.

The statutory provisions believed to confer jurisdiction of the appeal as to this Court are 28 USC §1257(1), 28 USC §1257(2) and 28 USC §1257(3). A number of cases support exercise of this Court's jurisdiction.[1]

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[1] Several cases support the proposition that this matter properly comes within this Court's appellate jurisdiction because "a state statute is sustained within the meaning of §1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is

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CONSTITUTIONAL PROVISION, TREATY AND RULES INVOLVED

A. United States Constitution, Art VI, cl. 2.

"This Constitution and the Laws of the United

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invalid on federal grounds," *see, e.g., Japan Line, Ltd* v *County of Los Angeles*, 441 US 434, 441 (1979); *Cohen* v *California*, 403 US 15, 17-18 (1971), and state court rules have been explicitly held by this Court to be "statutes" within the meaning of §1257(2). *In re Griffiths*, 413 US 717 (1973); *Mayer* v *City of Chicago*, 404 US 189 (1971); *Lathrop* v *Donohue*, 367 US 820, 824-25 (1961). Indeed, there are specific instances of this Court exercising appellate jurisdiction over state court refusals to recognize treaties or, over instances where state courts sustain their own laws when challenged as contravening treaties, *see, e.g., Burthe* v *Davis*, 133 US 514 (1890); *Worcester* v *Georgia*, 6 Pet 515 (1823). Of course the cases establishing the supremacy of treaties (and international laws) in relation to state laws are extensive, *see, e.g., Takahashi* v *Fish & Game Comm'n*, 344 US 410 (1948); *Missouri* v *Holland*, 252 US 416 (1926); *The Paquete Habana*, 175 US 677 (1900); *Hauenstein* v *Lynham*, 100 US 483, 488-90 (1880); *Gibbons* v *Ogden*, 9 Wheat. 1 (1824); *Ware* v *Hylton*, 3 Dall 199 (1796), as are those indicating that dealings with foreign states (and particularly dealings which challenge foreign sovereignty) are matters exclusively within the province of the federal government, into which the states should not interject themselves. *Zschernig* v *Miller*, 389 US 429 (1968); *Banco Nacional de Cuba Sabbatino*, 376 US 398 (1964); *United States* v *Curtiss-Wright Export Corp.*, 299 US 304 (1936). Several cases also establish that, for purposes of the finality requirements of §1257, the Supreme Court of Michigan's ruling of February 22, 1983 certainly is a final judgment or decree, despite the fact that there are further proceedings in the lower state courts. *Nebraska Press Ass'n* v *Stuart*, 423 US 1327, 1329 (1975) (Blackman J.); *Cox Broadcasting Co.* v *Cohn*, 420 US 469 (1974); *Mercantile Nat'l Bank* v *Langdeau*, 371 US 555 (1963); *Cohen* v *Beneficial Indust Loan Corp.*, 337 US 541 (1949); *Forgay* v *Conrad*, 6 How 201 (1848).

States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary nothwithstanding."

B. Treaty:
Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 USC §1781 (Appendix 34a)

C. Michigan General Court Rules of 1963, 302, 305, 306 (Appendix 53a)

STATEMENT OF THE CASE

On July 23, 1980, in response to Appellee's Notice of Taking Depositions at Wolfsburg, Federal Republic of Germany, of certain of Appellant's employees and others who were not employees (but all of whom were and are German Nationals), Appellant filed its Motion to Quash in the Circuit Court, Wayne County, Michigan, asserting that the Notice was in violation of the Supremacy Clause of the United States Constitution in that it required depositions to be taken in violation of the provisions of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter the "Hague Convention"). The Hague Convention is an extant treaty to which the United States and the Federal Republic of Germany are parties. Appellant also alleged that the deposition procedures contravened the civil and criminal law of the Federal Republic of Germany; thus violating international law and principles of international comity.

Notwithstanding the objections raised by Appellant on these grounds, the Trial Court issued its order, without opinion, on October 7, 1980. (Appendix 24a). The issue was duly certified

as an interlocutory appeal to the Michigan Court of Appeals. On May 27, 1982, the Court of Appeals, without opinion, ordered the appeal denied. (Appendix 3a). A timely Application for Leave to Appeal was filed with the Michigan Supreme Court on June 10, 1982, seeking such on an emergency basis.

On August 17, 1982, the Trial Court again entered an order that the depositions proceed in the Federal Republic of Germany setting depositions in Wolfsburg to be taken on or before August 30, 1982. A Notice of Deposition for August 24, 1982, was then served. An Application for Emergency Stay of Proceedings and for Immediate Consideration was filed with the Supreme Court of Michigan on August 18, 1982.

At every stage, the question sought to be reviewed was timely raised.

The Michigan Supreme Court failed to act and on August 23, 1982, the Chief Justice of this Court entered an Order staying the orders for the depositions pending the final disposition of the appeals before the Michigan Supreme Court, case Nos. 69595 and 69596. (Appendix 30a).

The Supreme Court of Michigan did "finally act" on February 22, 1983, without opinion but by Order which stated in part,

> "****The emergency applications for leave to appeal are also considered, and they are DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court . . ." (Appendix 1a)

On March 28, 1983, Appellee, in accordance with the Order of Supreme Court of Michigan, served an amended Notice of Depositions for the taking of depositions on Monday, May 2, 1983, of certain named German nationals, including employees of Appellant, in Hamburg, Federal Republic of Germany.

Appellant, Volkswagenwerk Aktiengesellschaft, a corporation of the Federal Republic of Germany, on April 5, 1983, filed a Motion for Stay with the Michigan Supreme Court and on April 8, 1983 filed a Motion for Stay with the Wayne

County Circuit Court. On Friday, April 15, 1983, the Trial Court denied this motion, pursuant to the Order of the Michigan Supreme Court, *supra.* As of the filing of this Appeal, the Supreme Court of Michigan has not acted on this request for a stay of the renewed deposition notice. Justice O'Connor, however, on April 29, 1983, granted a Stay as to these depositions pending disposition by the Michigan Supreme Court on the "Application for Emergency Stay" before it.

Although proceedings continue in the Michigan Trial Court as to the matter in chief, there has been a final ruling of the Michigan Supreme Court that the provisions of the Michigan General Court Rules, as applied in this matter, take precedence over both the Treaty between the United States and the German Federal Republic and the Supremacy Clause.

Specifically, the Wayne County Circuit Court orders, as sustained through the refusal to review or reverse by the Michigan Supreme Court, would require Appellant to produce certain German nationals whom plaintiffs allege to be employees of Appellant for American-style depositions in Germany following the procedures of the Michigan General Court Rules. (The relevant Michigan General Court Rules, GCR, 1963, 302, 305 and 306 are included at Appendix 53a.) The Michigan Trial Court further directed that the witnesses answer *all* questions put to them by American lawyers without regard to the provisions of German law expressly forbidding such a procedure. (See letter of German Ambassador, *infra*).

Appellant contends that these procedures, are inconsistent with, and therefore violative of, the Hague Convention and the reservations included in the treaty by the Federal Republic of Germany.

There are two methods of taking evidence under the Hague Convention: "Letters of Request" as set forth in Chapter I and "Taking of Evidence By Diplomatic Officers, Consular Agents and Commissioners" in Chapter II. In a Treaty reservation the Federal Republic of Germany has declared:

> The Federal Republic of Germany declares in accordance with the option provided for in the first sentence of paragraph 1 of Article 33 of the Convention to make a reservation excluding the application of the provisions of Chapter II of the Convention that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved. (Appendix 50a)

This leaves the "Letters of Request" mode of obtaining evidence under Chapter I as the only available means under the Treaty of obtaining evidence of German nationals on German soil. A review of the procedures for letters of request in Chapter I (Appendix 36a) shows that magistrates of the Central Authority of the Contracting States are the persons who perform the function of gathering the requested information — not American lawyers conducting American-style depositions. (Appellees have been repeatedly advised of this procedure but have steadfastly refused to proceed in accordance with it). Obviously, activities such as those ordered by the Michigan Courts herein clearly violate German sovereignty and the German Criminal Code.

Pursuant to Article 35d of the Hague Convention, the Government of the Federal Republic of Germany has further declared:

> "The local court in whose district official acts would have to be performed by virtue to letters of request shall be . . . entitled to control the preparation and the actual taking of evidence . . ." (Appendix 52a)

The opposition of the Federal Republic of Germany to the proposed deposition method ordered by the Wayne County Circuit Court was made clear in a letter of the German Ambassador to the then Chief Justice Mary S. Coleman of the Michigan Supreme Court which is reproduced here: (Appendix 72a).

> THE AMBASSADOR
> of the Federal Republic of Germany
> Washington, June 25, 1982

The Honorable Mary S. Coleman
Supreme Court of the State
of Michigan
Appeal Box 30052
Lansing, Michigan 48909

RE: Falzon, et al. vs. Volkswagen of
America, Inc., et al.
Docket No. 69595 & 69596

Dear Judge Coleman:

The Foreign Office of the Federal Republic of Germany has been made aware of an order by the Circuit Court of the County of Wayne in the case of *Falzon* vs. *Home Insurance Co.,* Civ. Action No. 77, 722, 371 NP and *Falzon* v *Volkswagen of America, Inc.,* Civil Action No. 78, 803, 043 NP which is presently the subject of an application for permission to appeal to the Supreme Court of the State of Michigan. Because the order referred to raises grave questions of international law and contravenes German law and Sovereignty, the Federal Republic of Germany is compelled to express its concern and wishes to bring to the attention of the Supreme Court of Michigan the position of the Federal Republic of Germany in this matter.

The subject order of the trial court calls for "depositions" to be taken in Germany of designated German citizens without regard to the requirements of German law, procedure and sovereignty and treaty provisions presently in force between the United States of America and the Federal Republic of Germany. The trial court's order, in fact, contravenes German law and the treaty provisions.

The United States and the Federal Republic of Germany are parties to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The Convention, together with the provisions of ratification by the Federal Republic of Germany, establishes the legal framework and procedures for the taking of evidence in Germay for use in civil matters pend-

ing in the United States. The Convention sets forth the only procedures sanctioned by the German government for the taking of such evidence. The order in question not only contradicts the intergovernmental procedures existing between the Federal Republic of Germany and the United States, but also contravenes the principles of international law.

The Circuit Court's order of October 7, 1980 seeks to compel testimony by citizens and residents of the Federal Republic of Germany on German soil. The taking of evidence is an official act which the Federal Republic of Germany reserves exclusively to the judiciary. Any attempt to take evidence in the Federal Republic of Germany pursuant to the Michigan General Court Rules in contravention of the Hague Convention would violate applicable provisions of the German Criminal Code and would, more importantly, be considered an invasion of German sovereignty.

The order of the Circuit Court also refers to the "Notes Verbales of 1955" to control the course of taking the depositions. The exchange of notes only permits "questions" by consular officials, an "examination" in a formal procedural sense is not possible. This follows not only out of the text of the exchange, but rather also in that the "request to provide information" is only carried out on an absolutely voluntary basis and oaths may not be taken. The voluntary nature of the provisions of information is assumed by the exchange of notes in that compulsion may not be exercised in any manner, be it direct or indirect." "Questioning" may only be conducted by consular officials and interrogation by American attorneys involved in private civil litigation is not permitted. In view of the fact that the procedure permits only voluntary responses without compulsion, it depends upon the free will of the individual being questioned whether he wishes to answer the individual question or not.

The German-American exchange of notes of 1955/56 is not applicable to the taking of evidence by compulsion.

> The order of the Circuit Court seeks to compel the deposition of German citizens and to compel them to answer "all questions promulgated". The order is without force and effect in the Federal Republic of Germany and cannot be enforced.
>
> The Embassy of the Federal Republic of Germany takes the liberty of expressing its legal position with the expectation that, since the order of the Circuit Court violates German law and sovereignty, the Supreme Court of Michigan will grant the pending petition to appeal in order to consider the applicable law and to avoid acts inconsistent with the convention and the position of the German government.
>
> Without waiving any rights of the Federal Republic of Germany, this Embassy or its personnel to diplomatic, sovereign or any other form of immunity, the Embassy of the Federal Republic of Germany in the United States of America respectfully makes this request and stands ready to consider any request the Supreme Court may have for further information or elucidation of the position of the Federal Republic of Germany in this matter.
>
> Sincerely yours,
>
> Sign. Hermes

Throughout the various stages of these proceedings, including those in this Court, the Appellees have continued to obfuscate the primary issues and their ripeness for review. They appear to fault the clearly applicable treaty procedures as somehow being obstructive, but they have not even attempted to comply with them, let alone to exhaust their remedies under the Hague Convention. They complain of allegedly delayed discovery but have refused, since the inception of the litigation, to expedite their needs in accordance with the sanctioned treaty methods. They urge the invalidity of applicable procedures which would request the cooperation of responsible

German authorities although analogous procedures are well known in our own *jurisprudence see, e.g.* subpoena practice under Rule 45(d), Federal Rules of Civil Procedure, involving proceedings in a district other than where the matter is pending; and letters rogatory under Rule 28(b), FRCP a procedural device contemplating request for assistance from foreign authorities.

THE QUESTION IS SUBSTANTIAL

This case presents an unusual and significant question of first impression concerning the constitutionality of a state court discovery order that purports to compel German nationals to submit to Michigan discovery procedures in Germany; procedures that German law does not recognize and that are violative of Treaty rights and of international comity. The issue of whether the order violates the procedures for judicial assistance set forth in the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, a treaty in force between the Federal Republic of Germany and the United States of America, is both novel and substantial. For a state court judge to be permitted to ignore the mandates of an applicable treaty in violation of the Supremacy Clause of United States Constitution and the judicial sovereignty of the Federal Republic of West Germany would indeed be extraordinary.

The fundamental law that orders relations between these separate nations is customary international law, as well as treaties and other agreements to which they are parties, including the Charter of the United Nations.[2] On the international level,

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[2] The basic treaty provisions requiring respect for the Federal Republic of Germany as a sovereign equal and protection of the rights and interest of a German nationals and companies are set forth in the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, and in the Treaty of Friendship, Commeree and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3.

every intrusion by a court of one nation into what may be regarded as the sovereign domain of a foreign nation cannot avoid creating a political strain in the relations of the nations concerned.

It is, of course, open to any government to disagree with another and act firmly on its own convictions. But that is a political, not a judicial decision. Absent a reasonably clear command by the competent political authorities, it is not the office of courts to be on the leading edge of international conflict involving the exercise of jurisdiction by one state in the territory of another.

The Federal Republic of Germany is a civil law state. Civil law states take the position that, in general, the gathering of evidence within the state for civil litigation is an exercise of "judicial sovereignty" entrusted exclusively to the courts and that any encroachment of this function by the courts or citizens of any foreign state may be regarded as a violation of

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The first mandatory Principle of the Charter is the "sovereign equality" of all U.N. members (Art. 2, para. 11). The United Nations General Assembly has declared, without dissent, that the principle of sovereign equality of States includes *inter alia*, the following elements.

"(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable; . . . ."

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

Article I, paragraph 1, of the Treaty of Friendship Commerce and Navigation between the United States and the Federal Republic of Germany provides, "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests."

". . . [A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const., art. VI, cl. 2.

Germany's "judicial sovereignty."[3] The difference between civil law and common law countries in this regard is well recog-

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[3] The Report of the United States Delegation (of leading experts in the field) to the Eleventh Session of the Hague Conference on Private International Law, which prepared the Hague Evidence Convention on the initiative of the United States, contains the following observations in this regard (8 Int. L. Mat. ["U.S. Report"] 785, 804, 806 (1969)):

> "In drafting the Convention, the doctrine of "judicial sovereignty" had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.
>
> "The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the "judicial sovereignty" of the host country, unless its authorities participate or give their consent. This civil law approach has a direct bearing upon choice among the three general methods of taking evidence abroad.
>
> "First — the letter of request or "commission rogatoire." This is a truly "judicial" act. The court of one State through appropriate channels, asks the court of another State to secure designated evidence for use at a trial in the requesting State. Here no "sovereignty" problem exists because the evidence is taken through the judicial process of the requested State.
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> Second — taking evidence by a diplomatic or consular officer of the requesting State. Diplomatic officers are infrequently employed for this purpose, but the use of consuls is well recognized within certain limits. Here there may be a "sovereignty" question, as the State where the consult acts may object to his entering into "judicial" activities on its territory in the absence of a consular convention authorizing him to do so.
>
> Third — the use of "commissioners" nominated by the court of the State where the action is pending. Here the "sovereignty" question is even more sharply raised. A commissioner acts as the extended arm of the court of the State which appoints him. In a State which follows the "judicial sovereignty" concept, the activities of a foreign commissioner constitute an obvious intrusion by an agent of a foreign judicial "sovereign".

See also Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int. & Comp. L.Q. 646, 647 (1969).

nized. (*See 4 Moore's Federal Practice,* Sec. 28.05)[4] The Hague Convention was the culmination of efforts to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.

By ratifying the Hague Convention, the Federal Republic of Germany has "opened its doors" to accommodate foreign litigants, but as previously noted, Germany, as it had a right to do under Article 35(d) of the treaty, specified certain limitations and qualifications to the Convention. Accordingly, the Federal Republic of Germany has mandated that all discovery requests be channeled through a proper central judicial authority in each German state by means of a Letter of Request. This was not done in the instant case.

Although the important question at hand is an issue of first impression in this Court, the mandatory use by litigants of the Hague Conventions' procedures for gathering evidence in foreign lands had been acknowledged by numerous courts. *See e.g., Pain* v *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Dahl* v *United Technologies Corp.*, 632 F. 2d 1027 (3rd Cir 1980).

Moreover, other courts which have considered this question

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[4] It is a crime in the Federal Republic of Germany for a private person to perform a state function, such as the taking of evidence.

German Penal Code, art. 132, in unofficial translation, provides: "Anyone who, without authority to do so, exercises public authority, or performs an action which may only be performed by a public authority, shall be punished by imprisonment up to two years, or by a money fine." The reference to "public authority" would appear to be limited to German public officials.

In Switzerland, Dutch attorneys attempting to interview a Dutch citizen in Switzerland in connection with a case in the Netherlands were arrested by Swiss authorities and released only after the Government of the Netherlands apologized and promised to discipline the Dutch attorneys. The Swiss position was taken on the basis of a provision of the Swiss Penal Code (art. 271) that was similar to art. 132 of the German Penal Code. The incident is discussed in Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 520 (1953).

have held not only that procedures of the Hague Convention are mandatory but also that the *Notes Verbales*[5] do not supply an acceptable alternate procedure. *Volkswagenwerk Aktiengesellschaft* v *Superior Court, Alameda County and Thomsen,* 123 Cal. App. 3d 840; 176 Cal. Rptr. 874 (1981); *Volkswagenwerk Aktiengesellschaft* v *Superior Court In And For Sacramento County,* 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973). In *Volkswagenwerk Aktiengesellschaft* v *Superior Court, Alameda County and Thomson, supra,* the California Court of Appeals faced the identical issue that is before this Court. The California Court held that the trial court's reliance on the *Notes Verbales* in preference to the Hague Convention constituted error and that the discovery order, if executed in Germany, would violate German judicial sovereignty.

Aside from the fact that the execution of the order entered by the trial court in the instant case would result in a serious violation of German judicial sovereignty,[6] there is the compell-

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[5] Reliance by the trial court on an exchange of diplomatic notes known as the *Notes Verbales* of 1955 is misplaced. The *Notes* do not supersede the treaty nor do they provide an alternative procedure acceptable to the German government for gathering evidence in civil cases. The position of the German government was made clear in a June 25, 1982 letter of the Ambassador of the Federal Republic of Germany to the then Chief Justice of the Michigan Supreme Court. (Appendix 72a).

As the letter of the German Ambassador makes clear, the procedure set forth in the exchange of notes of February 11, 1955, Jan. 13, 1956, and Oct. 8, 1956, renewed by the exchange of notes of Oct. 17, 1979 and Feb. 1, 1980 between the United States and the Federal Republic of Germany applies only to questioning by consular officials of the United States in Germany and prohibits direct or indirect compulsion. It is inapplicable to a discovery order such as that involved in the case at bar.

[6] This case presents no elements justifying an order ignoring the relevant German interests and policies. The rules regarding the taking of evidence in effect in Germany, while different from our own, are not unique; rather, they are characteristic of the European civil law system. Although there are inevitable differences on questions of when, how and in what form evidence may be taken, there is no suggestion that German rules are designed to frustrate the orderly collection of evidence in civil litigation, nor is there any evidence of hostility in German law or German courts to the underlying policies being advanced in products liability actions.

ing reason why the question raised by this appeal is manifestly substantial and calls for resolution in this Court.

The United States has entered into a treaty with the Federal Republic of Germany providing a specific procedure to be used for the taking of evidence in Germany. Since the Hague Convention has been ratified by the United States and is a treaty, it constitutes the supreme law of the land. U.S. Const. Art. VI, cl. 2. As a treaty, the Hague Convention supersedes all inconsistent federal and state procedures and must be respected by the state courts under the Constitution of the United States.[7] A state court cannot add or take from the force and effect of such a treaty. *Hines* v *Davidowitz*, 312 US 52, 63 (1941). As Tribe states in *American Constitutional Law,* (1978) at 168, "Under the supremacy clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control. Indeed, the treaty controls whether it is ratified before or after the enactment of the conflicting state law." (Citations omitted).

While procedures governing the taking of discovery are generally matters within state control, when such procedures are inconsistent with the Hague Convention, they are invalid. As this Court has declared in *United States* v *Belmont*, 301 US 324, 331: "[I]f a treaty does not supersede existing state laws,

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[7] U.S. Const. art. VI. In its landmark decision in *Gibbons* v *Ogden*, 9 Wheat 1 (1824), this court stated, "The appropriate application of that part of the [supremacy] clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In each such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

See also Missouri v. *Holland*, 252 U.S. 416 (1920); *Ware* v. *Hylton*, 3 Dall. 199 (1796); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1800); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948).

as far as they contravene its operation, the treaty would be ineffective." A duly ratified treaty is unmodifiable for any reason, including "equity, general inconvenience or substantial justice." *United States* v *Choctaw Nation*, 179 US 494, (1900). Indeed, the states are devoid of power to retard, impede, burden or in any way measure or control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. *Nash* v *Florida Industrial Commission*, 389 US 235, 240 (1967). State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. *United States* v *Pink*, 315 US 203, 230-231 (1942). Accordingly, a litigant acting under authority of the courts of the State of Michigan, cannot constitutionally take actions inconsistent with, and contrary to, the Hague Convention.

The crux of the present controversy is that a state court judge, without correction by the Michigan appellate courts, has construed the court rules of the state as superceding a federal treaty. This in spite of the fact that the power to deal with sovereign states is something that reposes in the federal government exclusively; a power that antedates the American Constitution's adoption. *United States* v *Curtis-Wright Export Corp.*, 299 US 304.

The failure of the state court in the instant case to apply a treaty of the United States, as well as its elevation of the Michigan General Court Rules over that treaty in contravention of the United States Constitution and of the fundamental principles of international law, international relations and comity, gives rise to a highly significant constitutional issue bearing upon federal-state relations. The application and interpretation of a treaty, in this case the Hague Convention, presents a uniquely federal question which should be resolved by this Court. *The Paquete Habana*, 175 US 677 (1900).

Throughout the history of this matter, which began in 1980[8] with the first notice of the depositions of German nationals to be taken in the Federal Republic of Germany, the Michigan Courts have been intransigent in their view that the provisions of the Michigan General Court Rules must prevail throughout the world. It would be caviling to suggest that the apparently flagrant and deliberate flaunting of the Supremacy Clause of Article VI of the Constitution is not a substantial issue for this Court's consideration and decision. Further, the rights and duties of the contracting Nations to a treaty to which the United States is a signatory cannot be over-ridden by the stubborn insistence of the Michigan Courts that their Rules and Procedures universally prevail despite both the sovereignty and the criminal code of the country in which the Michigan compulsion is to be exercised.

It is respectfully submitted that the question here presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution. Appellant would also request, in the alternative, that should the Court not consider this appeal the appropriate mode of review, it consider and act upon these papers as a petition for certiorari[9] pursuant to 28 USC §2103.

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[8] The extended history of the issue below has been occasioned by the delay of the trial court in certifying the record on appeal and the delay of the Michigan Court of Appeals and the Supreme Court of Michigan in issuing their respective orders of denial. Nevertheless, the sheer passage of time evidences that the decision at every level of the Michigan Courts to compel performance in accordance with the Michigan Court Rules was made deliberately and after full consideration was given to the consequences of their action.

[9] The Court can treat this matter pursuant to 28 USC §2103, as a petition for statutory certiorari under 28 USC §1257(3) or for common law certiorari or other appropriate writ under the All Writs Act, 28 USC §1651.

CONCLUSION

Probable jurisdiction should be noted

BUSHNELL, GAGE, DOCTOROFF & REIZEN

BY: _____
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(Counsel of Record)

BY: _____
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BY: _____
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I

INDEX TO APPENDIX TO JURISDICTIONAL STATEMENT

This Index is outlined pursuant to Supreme Court of the United States Rule 15.1(j).

Appendix
Page

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of February in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Associate Justices.

69595 & (11)(17)(18)
69596 & (11)(15)(16)

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend
of JOSEPH D. FALZON, STEVEN FALZON,
RODNEY FALZON, and RAMON FALZON,
Minors,

Plaintiffs-Appellees,

and

HOME INSURANCE COMPANY,

Intervening Plaintiff,

v

SC: 69595
COA: 63236
LC: 77-722-371-NP

VOLKSWAGEN MANUFACTURING CORP.
OF AMERICA, a Pennsylvania corp.,
WOOD MOTORS INCORPORATED, a Michigan
corp., and GMBH, a corporation,

Defendants,

and

VOLKSWAGENWERK AG, a foreign
corporation,

Defendant-Appellant.

JOSEPH and BARBARA J. FALZON,
Individually, and as Next Friend
of JOSEPH D. FALZON, STEVEN FALZON,
RODNEY FALZON, and RAMON FALZON,
Minors,

Plaintiffs,

v

SC: 69596
COA: 63237
LC: 78-803-403-NP

VOLKSWAGEN OF AMERICA,
INCORPORATED, a New Jersey
corporation,

Defendant.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The emergency aplications for leave to appeal are also considered, and they are DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court. The motions for stay of proceedings are DENIED as moot.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do herby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of February in the year of our Lord one thousand nine hundred and eighty three.

/s/ CORBIN R. DAVIS,
Deputy Clerk.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 27th day of May in the year of our Lord one thousand nine hundred and eighty-two.

Present the Honorable Robert J. Danhof, C.J., Presiding Judge; S. Jerome Bronson, Walter P. Cynar, Judges.

(Title of Court and Cause)

JOSEPH and BARBARA J. FALZON,
Individually, and as Next Friend
of JOSEPH D. FALZON, STEVEN FALZON,
RODNEY FALZON, and RAMON FALZON,
Minors,

Plaintiffs-Appellees,

-vs-

No. 63237
LC: 77-722-371-NP

VOLKSWAGEN OF AMERICA, INCORPORATED,
a New Jersey corporation,

Defendant.

In these causes applications for leave to appeal are filed by defendants-appellants, and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the applications be, and the same are hereby DENIED for failure to persuade the Court of the need for immediate appellate review.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 28th day of May in the year of our Lord one thousand nine hundred and eighty-two.

/s/ RONALD L. DZIERBICKI,
Deputy Clerk.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE
C. A. No. 77-722-371 NP
Honorable Charles S. Farmer (P 13296)

JOSEPH AND BARBARA J. FALZON, Individually and as Next Friend of JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON and RAMON FALZON, Minors,
Plaintiffs,
vs.
HOME INSURANCE COMPANY,
Intervening Plaintiff,
vs.
VOLKSWAGEN MANUFACTURING CORPORATION OF AMERICA, a Pennsylvania Corporation, VOLKSWAGENWERK A.G., a Foreign Corporation, WOOD MOTORS, INC., a Michigan Corporation, and GMBH, a Corporation, Jointly and Severally,
Defendants.

C. A. No. 78-803-043 NP
Honorable Charles S. Farmer (P 13296)

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend
of JOSEPH D. FALZON, STEVEN
FALZON, RODNEY FALZON and
RAMON FALZON, Minors,
Plaintiffs,
vs.
VOLKSWAGEN OF AMERICA, INCOR-
PORATED, a New Jersey Corporation,
Defendant.

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AKTIENGESELLSCHAFT, a Foreign Cor-
portation, and VOLKSWAGEN OF AMERICA,
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Of Counsel for Defendant, WOOD
MOTORS, INC.

DENNIS E. ZACHARSKI (P 27389)
Attorney for HOME INSURANCE COMPANY

ORDER DENYING DEFENDANT'S MOTION TO STAY THE TAKING OF CERTAIN DISPOSITIONS

At a session of said Court held in the City-County Building, Detroit, Michigan on April 15, 1983.

PRESENT: HONORABLE CHARLES S. FARMER, Circuit Court Judge

This matter comes before the Court on Motion of Defendant VOLKSWAGEN AKTIENGESELLSCHAFT for an Order Staying the Deposition of certain German nationals whose depositions have been scheduled by Plaintiffs to commence at 10:00 a.m. on May 2, 1983, in the Federal Republic of Germany.

On February 22, 1983, the Michigan Supreme Court entered its Order Denying Leave to Appeal from this Court's Orders of October 7, 1980 and August 17, 1982. A stay, which had been entered by Chief Justice Warren E. Burger of the United States Supreme Court in Supreme Court Docket No. A-191, expired on its own terms as a result of the Michigan Supreme Court's decision to dispose of the case by refusing to grant leave to appeal. Subsequently, on March 4, 1983, (Amended March 28, 1983) Plaintiffs again by notice scheduled the depositions of eleven (11) German nationals, and it is to that Notice of Taking Deposition that Defendant VOLKSWAGEN AKTIENGESELLSCHAFT now requests a stay.

Upon consideration of the pleadings and the arguments of counsel, it is the Court's opinion that the Motion for Stay should be denied.

NOW, THEREFORE, IT IS ORDERED that the Motion for Stay filed by Defendant VOLKSWAGEN AKTIENGESELLSCHAFT with regard to the March 28, 1983, notice scheduling the depositions of eleven (11) German nationals to begin in the Federal Republic of Germany on May 2, 1983, all pursuant to this Court's earlier Orders of October 7, 1980 and

August 17, 1982 be and the same is hereby denied.

CHARLES S. FARMER
Circuit Court Judge

(A True Copy)
JAMES R. KILLEEN
Clerk
By:
Deputy Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE
Nos. 77-722-371 NP
78-803043 NP

JOSEPH FALZON, et al
vs.
VOLKSWAGEN MANUFACTURING CORPORATION OF AMERICA, et al,

Aug. 17, 1982

ORDER REQUIRING DISCOVERY

Upon the plaintiffs' motion for default, and the defendant having responded, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant Volkswagen A.G. produce for depositions in Wolfsburg, Germany, all employees as identified in this Court's order of October 7, 1980, for deposition on or before August 30, 1982, at a location to be mutually agreed upon in Wolfsburg, Germany.

IT IS FURTHER ORDERED that unless this order is complied with, or unless this order is stayed or otherwise modified, failure to produce said employees by the August 30, 1982, date shall subject defendant Volkswagen A.G. to appropriate sanctions as will be determined by this Court.

IT IS SO ORDERED.

CHARLES S. FARMER
Circuit Court Judge

Approved as to Form only:
RONALD W. SZCZESNY
CARL J. MARLINGA

(A True Copy)
JAMES R. KILLEEN
Clerk
By:
Deputy Clerk
Approved as to Form only:

(Title of Court and Cause)

CERTIFIED CONCISE STATEMENT
OF FACTS AND PROCEEDINGS

On September 20, 1973, plaintiffs purchased a 1973 Volkswagen microbus from defendant Wood Motors, Inc., in Detroit, Michigan. The microbus was designed and manufactured in Germany by defendant Volkswagen Aktiengesellschaft (VWAG) and imported through defendant Volkswagen of America, which is licensed to distribute Volkswagen vehicles to a portion of the United States including the State of Michigan. Volkswagen of America, in turn, sold the microbus to Wood Motors, Inc., a licensed Volkswagen dealership, where it was sold to plaintiffs.

Plaintiffs are citizens and residents of the State of Michigan. Joseph Falzon and Barbara J. Falzon are husband and wife. On October 27, 1974, they were driving the microbus (designated a "Type II" vehicle by defendants) in Michigan with their children, Joseph D. Falzon, Steven Falzon, Rodney Falzon and Ramon Falzon as passengers. The vehicle then overturned, ejecting certain members of the Falzon family. As

a result, both Mr. and Mrs. Falzon were rendered quadriplegics and their children sustained other injuries.

This is a products liability action filed in Wayne County Circuit Court on June 3, 1977 to obtain redress for the injuries sustained in the October 27, 1974 accident. The complaint alleges that negligence in the design of the microbus and breaches of implied warranties are a proximate cause of the injuries sustained by plaintiffs. The design features with which plaintiffs take issue are the windshield retention and adhesion system, the door latch system, lack of cross-wind stability, and rollover and passenger ejection characteristics.

It is undisputed that the Michigan courts have subject matter jurisdiction over this lawsuit and that this Court has personal jurisdiction over all parties to the litigation. This court has previously determined that Wayne County venue is proper, a ruling the defendants do not intend to attack on appeal.

On April 18, 1980, plaintiffs' counsel advised defense counsel that he would be scheduling the depositions of Volkswagen engineers in Germany at a later date, probably by early September (attachment A), and defense counsel advised that this would be a satisfactory time, an arrangement confirmed by letter of May 12, 1980 (attachment B). On June 17, 1980, defense counsel advised plaintiffs' counsel that she had no objections to the depositions in Germany and had applied for her passport (attachment A). Having received no defense objection, on June 25, 1980, plaintiffs filed their Notice of Taking Depositions (attachment C) pursuant to GCR 1963, 306 scheduling the depositions of a number of VWAG engineers in Germany, their place of residence, for the week of August 4, 1980. The following day, the June 17, 1980 agreement of counsel was confirmed by letter (attachment D).

On July 7, 1980, the defense counsel sought adjournment of the scheduled trial in *Wieczorek* v *Volkswagen*, Civil Action No. 78 716 28, claiming that the *Wieczorek* trial date conflicted with the upcoming depositions in this case which defense

counsel planned to attend (attachment A). On July 17, 1980, with the depositions two and one-half weeks away, defense counsel sought a postponement of the August 4th depositions on the ground that he would be attending an American Bar Association convention at that time (attachment A).

On July 23, 1980, with the depositions less than two weeks away, defendants filed a Motion to Quash Depositions. In essence, defendants contend that the depositions would be unauthorized by Michigan, Federal, international, and German law. Defendants have sought to require plaintiffs to resort to the "Letters Rogatory" procedure which would entail plaintiffs requesting permission from the German government to question the VWAG employees.

Plaintiffs responded to the defense Motion to Quash Depositions, contending that the depositions are authorized by Michigan law and consistent with Federal, international and German law. Plaintiffs have also contended that the "Letters Rogatory" procedure will be inadequate to obtain meaningful discovery, citing VWAG's initial formation at the behest of the Chancellor of the German government and the German government's ownership of VWAG.

The parties have filed numerous pleadings and briefs in support of their respective positions. VWAG's pleadings on point consist of the Brief in Support of Motion to Quash, filed July 23, 1980; Reply Brief in Support of Motion to Quash, filed on August 13, 1980; and Response to Plaintiffs' Reply, filed on August 23, 1980. Plaintiffs' pleadings on point consist of their Memorandum in Opposition to Defendant's Motion to Quash Discovery, filed August 4, 1980 and their Reply Memorandum in Opposition to Defendant's Motion to Quash Discovery, filed August 21, 1980. Since VWAG's efforts to prevent the depositions were in progress, the depositions were not taken as scheduled on August 4, 1980.

On September 5, 1980, the Court ruled that the depositions could proceed in accord with the Michigan General Court

Rules and Notes Verbales. Defendants declined to approve the proposed Order submitted by plaintiffs, so the formal Order allowing the depositions at a mutually convenient time (attachment E), was not entered until October 7, 1980.

On the twentieth day thereafter, October 27, 1980, VWAG filed its Motion for Reconsideration, thereby precluding the Order from becoming effecting. On November 20, 1980, plaintiffs filed their Memorandum in Reply to Motion for Reconsideration. Thereafter, VWAG filed its response thereto. Ultimately, on December 5, 1980, the Court entered its order denying VWAG's Motion for Reconsideration of the October 7, 1980 Order Denying Defendant's Motion to Quash Depositions. On December 26, 1980, twenty-one days after entry of the Order Denying Motion for Reconsideration, VWAG filed its Application for Leave To Appeal and Proposed Concise Statement of Facts to seek an interlocutory appeal from the trial court's orders allowing the depositions of the named VWAG employees.

Insofar as the international aspects of the case to date are concerned, VWAG successfully prevailed on the Court and plaintiffs to allow its German expert, Frank Achenich, to inspect plaintiffs' vehicle in Michigan. In addition, VWAG has filed a number of Affidavits executed by German nationals, some of them administered under oath to German notaries public. Many of these are affidavits by the proposed deponents, allegedly unsolicited by VWAG, in which the affiants volunteer their sworn versions as to their work experiences, knowledge of the technical matters involved in this lawsuit, and their purported reluctance to testify because of their business responsibilities for VWAG. Defendant VWAG will not allow plaintiffs to cross-examine the affiants as to the accuracy and credibility of their affidavits. In view of these proceedings, the depositions have not been taken.

In order to prevent the deponents from refusing to answer specific questions, which would require counsel to return from

Germany, obtain further orders from Wayne County Circuit Court, and go back to Germany to obtain an answer, plaintiffs sought a protective order that would require the deponents to answer the questions posed subject to later judicial review of the relevance of the testimony.

On July 23, 1980, VWAG filed its Motion for a Protective Order. This Motion, citing fears that plaintiff's counsel would disseminate technical Volkswagen engineering data to rival automobile manufacturers, sought to prevent plaintiffs' counsel from revealing the information obtained at the depositions.

Both parties opposed the protective order motion of the other. The protective order issues were briefed in conjunction with the deposition issues and are resolved in the Court's Order of October 7, 1980 (attachment E). VWAG proposes to seek interlocutory appellate review of the Order, as it deals with the motions for protective relief.

Defendant has also moved to strike portions of plaintiffs' pleadings discussing VWAG's national origin and its relationship to the German government. Plaintiffs have taken the position that it was VWAG which first cited and relied on the German citizenship of VWAG and the deponents as the necessary premise of its legal arguments.

On June 2, 1980, plaintiffs-appellees served a Notice of Deposition on defendant-appellant VWAG, requesting that VWAG produce 12 German nationals for deposition on German soil during the week of August 4, 1980. Defendant-appellant contends that this was in contravention of the express provisions of a Treaty known as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. 1781, in that it sought such discovery without the proper judicial assistance and mandatory procedure as set forth in the Treaty. Defendant-appellant claims that said Notice violated not only the law of the United States, but the law of the Federal Republic of Germany and general international law in that said Notice offends German sovereignty.

Moreover, defendant-appellant alleges that several of the proposed deponents are no longer employees at VWAG. Further, several of the proposed deponents had no responsibility for design, manufacturing or testing of 1973 type II, van type vehicles, such as the vehicle involved herein, and some of the proposed deponents are not knowledgeable concerning the subject litigation and details of the claims or allegations herein. (Two of the named deponents have volunteered to appear at depositions in Michigan). These individuals are knowledgeable concerning the VW type II, van type vehicles and their design, development, manufacture and testing and one of two said deponents is knowledgeable concerning the subject vehicle having inspected it and the subject accident and litigation. In addition, both these individual have access to all available records, tests, designs, drawings, or other documents relevant to the subject matter of this litigation.

Further, plaintiffs-appellees filed their Motion for Protective Order requesting that the Court order the deponents to answer any and all questions promulgated without the Circuit Court first being advised of the nature and scope of the questions propounded and objected to, and without the court first ruling on the appropriateness of the questions and the objections thereto.

Defendant-appellant VWAG objected to the Notice Procedure used by plaintiffs-appellees and moved to quash the depositions on the grounds:

> A. That the procedure advocated by plaintiffs-appellees was in direct contravention of the Hague Convention on Taking Evidence abroad; the codification of that Treaty in 28 U.S.C. § 1781; the United States Constitution Art. VI, Sec. 2.; the German Civil and Penal Codes; and the Michigan General Court Rules.
>
> B. Plaintiffs' Motion for Protective Order was in reality a premature, unnecessary request to compel discovery and was contrary to GCR 1963, 306.2.
>
> C. Plaintiffs had made no showing of the relevance of

the deponents and the information desired.

D. The plaintiffs' Proposed "Protective Order" would be unfair and prejudicial to defendant.

Defendant-appellant further promised to produce, at its own expense, two of the witnesses on plaintiffs-appellees' lsit, who are knowledgeable as stated, while plaintiffs-appellees proceed pursuant to the procedure mandated by the Hague Convention concerning any other individuals, so that plaintiffs-appellees' discovery would not be unduly delayed. Once plaintiffs-appellees have completed the Michigan depositions of the two knowledgeable deponents referred to above, they may have no further need for the discovery which they are now seeking. In any event, the procedures of the Treaty remain available to plaintiffs-appellees for their appropriate use at any time. To date, plaintiffs-appellees have made no attempt whatsoever to proceed in the appropriate, legal and acceptable manner mandated by the Treaty in force between the United States and the Federal Republic of Germany.

At the hearing on July 25, 1980, the Court ordered plaintiffs-appellees to submit a Memorandum in Opposition to defendant-appellant's Motion to Quash Discovery and in support of plaintiffs-appellees' Motion for Protective Order and to Compel Discovery. In their Memorandum filed on August 4, 1980, plaintiffs-appellees argued:

"I. This Court must deny the Motion of Defendant VWAG for a Protective Order and must enter an order requiring defendant VWAG to produce its agents and employees at the American Consulate in Germany for depositions on August 4, 1980 as set forth in the Notice of Taking Depositions previously filed.

A. GCR 1963, 304.2 specifically authorizes the taking of depositions in foreign countries before the Consul of the United States.

B. Under international law in effect at the time of the accident and in effect at the present, the German government has authorized depositions of its nationals at American Consular offices.

C. The Hague Treaty, ratified by Germany in June of 1979, does not abrogate the pre-existing agreement by the German government, is non-retroactive in any event, and defendant is estopped by its inaction from asserting the applicability of the Treaty.

II. In establishing the procedures to be employed at the depositions, the Court should deny the motions of defendant to curtail discovery and should require the deponents to answer the questions promulgated.

A. Defendant's unsupported allegation that plaintiffs will improperly use or divulge 'trade secrets' furnishes no basis for quashing the depositions or placing onerous restrictions on plaintiffs' counsel.

B. This Court should not require plaintiffs to disclose in advance the questions they propose to ask at the depositions.

C. This Court should not resign plaintiffs to defendant's proposed alternative without allowing it to handpick the employees it will allow plaintiffs to depose in the United States.

D. Under the circumstances of this case, it is appropriate for the Court to require the deponents to answer all questions with the protections proposed by the plaintiffs rather than allowing the employees of VWAG to refuse."

On August 13, 1980, defendant-appellant filed its reply to plaintiffs-appellees' Memorandum and asserted the following:

"I. Plaintiffs fail to establish the relevance and materiality of the depositions requested, and their request should be denied on this basis alone.

II. Plaintiffs' failure to delineate the areas of inquiry supports VWAG's concern about the dissemination of trade secrets.

III. The Michigan General Court Rules control the course of discovery in the case at bar, as long as those rules do not conflict with international law.

IV. The Hague Convention as a formally executed treaty, supersedes any informal agreement between the parties made prior to the ratification of the treaty, the

specific terms of which treaty reject the informal agreement.

V. The Note Verbales of 1955 permit only voluntary appearances and do not include depositions.

VI. The Hague Convention applies to all actions pending at the time of ratification and implements a procedure already recognized by Michigan in other contexts.

VII. The Letters of Request procedure is not disfavored under circumstances such as are present here: In fact, Letters of Request are necessary if any depositions are to be had in Germany.

VIII. Estoppel does not apply where plaintiffs have not complied with the law and defendants have complied with plaintiffs' valid requests for discovery.

X. The only proposed protective order properly before this Court involves documents, not depositions."

On August 20, 1980, defendant-appellant filed its Motion to Strike Plaintiffs-Appellees' Memorandum in Opposition to Defendant-Appellant VWAG's Motion to Quash Discovery for the following reasons:

A. "Plaintiffs' Memorandum . . . contains offensive and prejudicial allusions to defendant VWAG's national origin which severely jeopardize and undermine defendant's right to a fair trial.

B. ". . . Plaintiffs' reliance on irrelevant, immaterial hearsay such as the "20/20" television program, to buttress plaintiffs' misplaced attack on defendant VWAG's good faith in the case at bar is completely inappropriate."

On August 21, 1980, plaintiffs-appellees filed their Reply Memorandum in which plaintiffs-appellees contended:

"I. Plaintiffs have good faith reason to believe that the deponents will be able to provide information relevant to this case.

II. The Proposed Order is permissible under Michigan law and International law."

On August 23, 1980, defendant-appellant responded to the plaintiffs-appellees' Reply as follows:

"I. Plaintiffs have made no showing to this Court that the Republic of Germany is the real party in interest in

this action and therefore, even if accurately presented, plaintiffs' case authority would not apply.

II. Plaintiffs make no proper showing that defendant VWAG has refused to make discovery in this action, and plaintiffs' allegations to this effect should be disregarded by the Court.

A. Plaintiffs have failed to demonstrate a theory of the case or to make an adequate showing of the defects alleged in the subject vehicle.

B. Defendants' proposed method of conducting discovery will be efficient and less expensive than that proposed by plaintiffs.

III. Plaintiffs' argument that the Notes Verbales of 1955 take precedence over a subsequently enacted treaty is without merit."

On September 5, 1980, the Court ruled that the depositions of the persons represented by plaintiffs-appellees to be employees of defendant-appellant in Germany were to be taken in Germany in accordance with the Notes Verbales of 1955, and further required that the German citizens answer all questions promulgated to them. The trial court certified the question for appeal, and on October 7, 1980, the Court's Order was entered. At that time, the Court had not ruled on defendant-appellants' Motion to Strike Plaintiffs-Appellees' Memorandum.

On October 27, 1980, defendant-appellant filed its Motion for Reconsideration for the following reasons:

"A. There are palpable defects in the Court's Order in that the Order mandates a procedure by which plaintiffs cannot receive the relief requested and the relief granted is contrary to the procedure which the Order requires.

B. There was no showing by plaintiffs of the relevancy of the depositions sought.

C. The Court did not specifically consider the offer of VWAG to submit two of the named individuals on

plaintiffs' proposed list for deposition in the United States.

D. The Notes Verbales were never intended for use by private litigants, and as such do not provide for cross-examination or interrogation by American attorneys.

"Questions may be promulgated only by consular officials of the United States, and are unaccompanied by oath-taking or compulsion. Therefore, this procedure does not produce material of evidentiary value in Michigan courts.

E. That because of the nature of the Notes Verbales, as described more fully above, that part of the Court's Order directing deponents to answer all questions promulgated is contrary to and in violation of said Notes.

F. That if depositions of German Nationals in Germany which would have evidentiary value in Michigan Courts can be taken, the only procedure possible to obtain such discovery is is that provided for in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matter, 28 USC 1781.

G. That in the interest of expediting discovery, Messrs. Frank Achenich and Joachim Pohl, both of whom plaintiffs have indicated a desire to depose, have stated their willingness to travel to the United States for depositions while plaintiffs proceed to submit Letters of Request pursuant to the requirements of the Hague Convention in order to depose those individuals with relevant information that they wish to depose."

Defendant-appellant also submitted affidavits volunteered by the proposed deponents in which all but the two individuals VWAG had agreed to produce in the United States indicated thay had no information relevant to the case at bar and would not appear voluntarily.

On November 20, 1980, plaintiffs-appellees submitted their

Memorandum in Reply to Motion for Rehearing and argued the following:

> "I. Reconsideration should not be granted where the Court has given the fullest conceivable consideration to, and has repeatedly rejected, the arguments made by VWAG and where all of VWAG's argument have been, or could have been previously made.
>
> A. Reconsideration should not be granted to allow VWAG to raise new arguments which could have been, but were not presented previously.
>
> B. A Motion for Reconsideration must be denied where the arguments made have previously been made, thoroughly considered by the Court, and rejected.
>
> II. The affidavits filed by defendant substantially demonstrate the propriety of the Court's previous order and the correctness of the Court's legal analysis.
>
> A. The fact that the deponents have provided testimony, through administration of the oath in Germany, without resort to Letters Rogatory, to assist one of the parties to this American litigation (VWAG), *ipso facto* belies VWAG's claim that the depositions would be improper.
>
> B. The willingness of the affiants to volunteer their testimony by affidavit refutes VWAG's claim that they will not cooperate.
>
> C. The affiants, who have voluntarily appeared in this Michigan action through their affidavits, who have voluntarily sought affirmative relief from the Court, who have voluntarily undertaken to provide their testimony and information, and who have voluntarily placed their credibility in issue, are personally subject to the Court's jurisdiction, having waived any lack of personal jurisdiction.
>
> III. The affidavits submitted by VWAG do not change the substantive correctness of this Court's Order.

A. The affidavit of Herr Elmar [sic] Rauch does not require the Court to vacate its prior Order.

B. Questions of legal relevancy under Michigan law are to be determined by this Court, after the testimony has been adduced, not by German engineers, and there is a sufficient threshold showing to allow the depositions to proceed."

On November 28, 1980, defendant-appellant submitted its Motion to Strike Plaintiffs-Appellees' Memorandum In Reply to Motion for Rehearing for the following reasons:

"A. Plaintiffs' allusions to defendant VWAG's foreign citizenship prejudices defendant's right to a fair trial.

B. Plaintiffs' blatant misstatements of the precedential value and holdings of the few cases they cite to support their conclusion must be stricken.

C. Plaintiffs' reference and self-interested interpretations of extraneous and inadmissible material as well as the unsubstantiated."

On November 21, 1980, defendant-appellant replied to plaintiffs-appellees' Response by asserting the following:

"A. Plaintiffs' Memorandum has mischaracterized VWAG's position relative to both the availability of discovery and its interpretation as to the applicable law governing proceedings.

B. Defendant's Motion for Reconsideration is appropriate.

C. The provision of affidavits by German nationals does not negate the German government's ban on compulsory testimony.

D. Affiants have not subjected themselves to this Honorable Court's personal jurisdiction.

E. Chapter I of the Hague Convention provides the only possible means of taking the discovery desired by plaintiffs on German soil."

Plaintiffs-appellees further contend that an understanding of the relationship between VWAG and the German govern-

ment is essential to an appreciation of why the Letters Rogatory procedure advocated by VWAG will be futile. Defendant-appellant has also moved to strike plaintiffs' references to other instances of VWAG's alleged obstruction of meaningful discovery. Plaintiffs-appellees contend that such a course of conduct is relevant to the Motion for Protective Order.

On December 5, 1981, the trial court denied defendant-appellant's Motion for Reconsideration, and granted defendant-appellant's Motion to Strike.

On December 15, 1981, plaintiffs-appellees objected to the entry of the Court's Order striking their Memorandum. This issue has not been resolved, and the Court's Order has not yet been entered to strike plaintiffs-appellees' Memorandum.

Defendant-appellant appeals from the December 5, 1980 Order, denying the Motion for Reconsideration of the October 7, 1980 Order.

The Court has indicated a willingness to grant VWAG's Motion to Strike, with the nature and language of the Order to be determined. Plaintiffs propose to seek leave to cross-appeal on this issue.

Pursuant to GCR 1963, 806.3, this Court does hereby certify that the Certified Concise Statement of Facts and Proceedings fairly presents the questions for review.

CHARLES S. FARMER,
Circuit Judge

Dated: March 4, 1982
(A True Copy)
JAMES R. KILLEEN, Clerk
By , Deputy Clerk

(Title of Court and Cause)

THE COURT'S SUPPLEMENTAL CONCISE STATEMENT FORMULATED AND CONDENSED BY THE COURT

The certified questions, in addition to those submitted, are:

1. Whether a Michigan Circuit Court Judge that has undisputed jurisdiction over the parties and subject matter can order defendant's (VWAG) employees or its former employees to submit to depositions in Germany, under oath and in accordance with Michigan Practice and Procedure (GCR 304.2) and Notes Verbales of 1955?

2. And whether or not the taking of such discovery depositions would violate the Hague Treaty (28 USC § 1781), or is obtaining of such information and disclosures confined to Letters Rogatory?

3. And whether or not the Court's Protective Order, surrounding portions of discovery relative to defendant VWAG's designs, etc., can be properly imposed by the Court?

EXHIBITS

1. United States Department of State's documents, re procedure for taking of foreign depositions.

2. Letter of January 7, 1981 from the German Federal Minister of Justice.

3. Certified translation of the letter of January 7, 1981 from the German Federal Minister of Justice.

CHARLES S. FARMER,
Circuit Judge

Dated: March 4, 1982.

(A True Copy)
JAMES R. KILLEEN, Clerk
By: , Deputy Clerk

(Exhibits not reproduced due to voluminous and bulky nature)

FILE WITH ASSIGNMENT CLERK ONLY
PRAECIPE FOR MOTION AND
ORDER/JUDGMENT
(Title of Court and Cause)

TO THE ASSIGNMENT CLERK: Please place Plaintiff's/Defendant's (strike one) Motion for (state nature of Motion in brief form)

Motion to Reconsider and/or Modify Order of October 7, 1980

On the motion calendar for (date) Friday, November 14, 1980, 11 A.M.

This motion is to be heard by JUDGE Charles F. Farmer.

TO COURT CLERK: Have the following Order/Judgment completed and signed by Judge and check 1 or 2 below, whichever is applicable.

ORDER/JUDGMENT

Dated: December 5, 1980.

1. IT IS HEREBY ORDERED THAT the aforesaid motion be and the same is hereby DENIED.

Circuit Judge

APPROVED AS TO FORM AND SUBSTANCE
BY COUNSEL FOR:

PLAINTIFF

DEFENDANT

RONALD W. Szczesny (P-24676)

Plaintiff's Attorney
Telephone No.

George E. Bushnell, Jr. (P-11472)
Noel A. Gage (P-13786)
Lynn H. Shecter (P-24845)

Defendant's Attorney
Telephone No. (313) 444-4848

(Title of Court and Cause)

ORDER PERMITTING PLAINTIFFS TO ATTEMPT TO TAKE DEPOSITIONS OF GERMAN CITIZENS IN GERMANY

At a session of said Court held in the City-County Building, Detroit, MI, this 7th day of October, 1980.

PRESENT: HONORABLE CHARLES S. FARMER, Circuit Judge.

This matter coming on to be heard on Motion of the plaintiffs, the parties being represented by counsel and the Court being advised in the premises;

IT IS HEREBY ORDERED that in view of this Court's desire for the Michigan General Court Rules control of these proceedings as much as possible, that the plaintiffs schedule the depositions of the following individuals, represented by plaintiffs to be employees in Germany of defendant VW AG, at a time mutually convenient for both plaintiffs' and defendant's counsel:

Frank Achenich, Gustan Mayer, Harmut Buerger, Karl Erck, Kurt Schwenk, Wolfard Albers, Joachim Pohl, Ulrich Sieffirt, Michael Klemp, Horst Albricht, Mr. Uterrriner, Wilhelm Buechner.

IT IS FURTHER ORDERED that the notes verbales of 1955 will control the course of the taking of these depositions;

IT IS FURTHER ORDERED that deponents shall answer all questions promulgated, and that counsel for the defendants shall have the right to place objections to said questions on the record, that the transcript shall be placed under seal and filed pending resolution of all such objections by the Court, that only counsel for the parties shall view said trancript pending such resolution, that the contents of said depositions and of said transcript shall remain confidential to only counsel for the parties;

IT IS FURTHER ORDERED that should plaintiffs be unable to take said depositions because of the operation of German law or because of the opposition of the Federal Republic of Germany, that plaintiffs pay their own costs and expenses incurred pursuant to the attempt to obtain said depositions;

IT IS FURTHER ORDERED that this issue is of major significance to the jurisprudence of this state and raises a serious question involving a conflict between the law of this state and of the United States, that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of the litigation, and that defendant VWAG may suffer substantial harm by awaiting final judgment before taking appeal.

/s/ _____
CHARLES S. FARMER
Circuit Judge

APPROVED AS TO FORM BY ALL PARTIES:

_____
Ronald W. Szczesny (P-24676)

_____
George E. Bushnell, Jr. (P-11472)

_____
Noel A. Gage (P-13786)

_____
Lynn H. Shecter (P-24845)

_____
Terrance M. Lynch (P-16892)

(A TRUE COPY)
JAMES R. KILLEEN, Clerk
By: R. CHAMONTOWSKI, Deputy clerk

For the Michigan Supreme Court's Final judgment or decree of February 22, 1983, appealed from, see Appendix 1a.

STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court No. 69595
Court of Appeals No. 63236
Wayne Circuit Court No.
77-722-371-NP

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend
of JOSEPH D. FALZON, STEVEN
FALZON, RODNEY FALZON AND RAMON
FALZON, minors,
Plaintiffs-Appellees,
and
HOME INSURANCE COMPANY,
Intervening Plaintiff,
vs.
VOLKSWAGEN MANUFACTURING CORPORATION
OF AMERICA, A Pennsylvania corporation,
WOOD MOTORS, INC., a Michigan corporation,
and GMBH, a corporation, jointly and
severally,
Defendants,
and
VOLKSWAGENWERK A.G., a foreign corporation,
Defendant-Appellant.

Supreme Court No. 69596
Court of Appeals No. 63237
Wayne Circuit Court No.
78-803043-NP

JOSEPH and BARBARA J. FALZON, Individually
and as Next Friend of JOSEPH D. FALZON,

STEVEN FALZON, RODNEY FALZON and RAMON FALZON, minors,
Plaintiffs-Appellees,
vs.
VOLKSWAGEN OF AMERICA, INC.,
A New Jersey corporation,
Defendant.

RONALD W. SZCZESNY (P 24676)
Attorney for Plaintiffs-Appellees
PAUL L. VELLA (P 21803)
Co-Counsel for Plaintiffs-Appellees
MARK R. BENDURE (P 23490)
Of Counsel for Plaintiffs-Appellees
GEORGE E. BUSHNELL, JR. (P 11472)
NOEL A. GAGE (P 13786)
CARL J. MARLINGA (P 17102)
JOHN K. PARKER (P 29563)
THOMAS A. HELLER (P 32892)

Received Apr. 22, 1983; Cobrin R. Davis, Clerk Supreme Court.

Attorneys for Defendants, VOLKSWAGEN MANUFACTURING CORPORATION OF AMERICA, a Pennsylvania corporation, VOLKSWAGEN AKTIENGESELLSCAFT, a foreign corporation, and VOLKSWAGEN OF AMERICA, INCORPORATION, a New Jersey corporation
TERRANCE M. LYNCH (P 16892)
Attorney for Defendant, WOOD MOTORS, INC.
BENJAMIN T. HOFFIZ, JR. (P 14035)
Of Counsel for Defendant, WOOD MOTORS, INC.
DENNIS E. ZACHARSKI (P 27839)
Attorney for HOME INSURANCE COMPANY

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE FINAL JUDGMENT OR DECREE OF THE SUPREME COURT OF THE STATE OF MICHIGAN

NOTICE TO:

Hon. Corbin R. Davis
Clerk to the Supreme Court of the
State of Michigan
Hon. James R. Killeen
Clerk, Wayne County Circuit Court
All Counsel of Record:
RONALD W. SZCZESNY, ESQUIRE
PAUL L. VALLA, ESQUIRE
MARK R. BENDURE, ESQUIRE
TERRANCE M. LYNCH, ESQUIRE
BENJAMIN T. HOFFIZ, JR., ESQUIRE
DENNIS E. ZACHARSKI, ESQUIRE

NOTICE is hereby given that VOLKSWAGENWERK, AKTIENGESELLSCAFT, a Foreign Corporation, and Defendant above-named, hereby appeals to the Supreme Court of the United States from the final judgment or decree of this Court entered February 22, 1983 denying Application for Leave to Appeal the Orders of the Wayne County Circuit Court, dated October 7, 1980 and August 17, 1982.

This Appeal is being taken to the Supreme Court of the United States pursuant to Sections 1257(2) and/or 1257(1) of Title 28 of the United States Code.

NOTICE IS also given that a copy of this Notice of Appeal is being filed with the Hon. James R. Killeen, Clerk of the Wayne County Circuit Court, pursuant to and in compliance with United States Supreme Court Rule 10.3, it being the

understanding of counsel that the Wayne County Circuit Court is possessed of the record of this matter.

RESPECTFULLY SUBMITTED,
BUSHNELL, GAGE, DOCTOROFF & REIZEN

BY: /s/ _____
GEORGE E. BUSHNELL, JR. (P 11472)

BY: /s/ _____
NOEL A. GAGE (P 13786)

BY: /s/ _____
CARL J. MARLINGA (P 17102)

BY: /s/ _____
JOHN K. PARKER (P 29563)

BY: /s/ _____
THOMAS A. HELLER (P 32892)
3000 Town Center, Suite 1500
Southfield, Michigan 48075
(313) 444-4848

DATED: April 22, 1983

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543
September 2, 1982

Received September 8, 1982.

Mark R. Bendure, Esq.
577 E. Larned, Suite 210
Detroit, Michigan 48226

RE: Volkswagenwerk, A.G. v. Joseph and Barbara J. Falzon etc., et al.

Dear Mr. Bendure:

Your response to the application for stay in the above-entitled case has been presented to the Chief Justice who, considering the response as an application to vacate the stay, has endorsed thereon the following:

"Denied
WEB
9/2/82."

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By /s/ Katherine A. Downs
Katherine A. Downs
Assistant Clerk

gtb
cc: Counsel of Record
Harold Hoag, Esq., Clerk, Supreme Court of Michigan (your Nos. 69595 and 69596)
James R. Killeen, Esq., Clerk, Circuit Court for the County of Wayne, Michigan (your Nos. 77 722, 371 NP and 78 803, 043 NP)

SUPREME COURT OF THE UNITED STATES
No. A-191

VOLKSWAGENWERK A.G.,

Applicants,

v.

JOSEPH AND BARBARA J. FALZON, ETC. ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the orders of the Circuit Court for the County of Wayne, Michigan, case Nos. 77 722, 371 NP and 78 803, 043 NP, entered October 7, 1980 and August 17, 1982, be and the same are hereby, stayed pending the final disposition of the appeals before the Michigan Supreme Court, case Nos. 69595 and 69596.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 23rd
day of August, 1982.
A TRUE COPY
By Christopher W. Vasil
Deputy

SUPREME COURT OF THE UNITED STATES

No. A-815

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Applicant,

v.

JOSEPH AND BARBARA J. FALZON, INDIVIDUALLY
AND
AS NEXT FRIEND OF JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON AND RAMON FALZON, MINORS

O R D E R

UPON CONSIDERATION of the application of counsel for the applicant, the opposition thereto and the reply,

IT IS ORDERED that the orders of the Circuit Court for the County of Wayne, Michigan entered October 7, 1980 and August 17, 1982, in Civil Action Nos. 77-722,371-NP and 78-

803,043-NP, permitting the taking of depositions presently noticed for May 2, 1983, be, and the same are hereby, stayed pending final action by the Supreme Court of Michigan on the Application for Emergency Stay presently pending before that Court.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 29th
day of April, 1983.

SUPREME COURT OF THE UNITED STATES

No. A-875

VOLKSWAGENWERK A.G. *v.* JOSEPH AND BARBARA FALZON, ETC.

ON APPLICATION FOR STAY

[April 29, 1983]

JUSTICE O'CONNOR, Circuit Justice.

Under Rule 44.4, the Justices of this Court will not entertain an application for a stay unless the applicant has first sought relief from the appropriate lower court or courts, except "in the most extraordinary circumstances." I conclude that this case presents most extraordinary circumstances and will therefore entertain the application and grant a stay.

The applicant is a German corporation that is defending an action in the Michigan state courts. The plaintiffs in that action seek to depose a number of employees of the applicant, all of whom reside in the Federal Republic of Germany. Attempting to prevent the depositions in the trial court, the applicant argued that the method the plaintiffs sought to employ violated the Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 28 U. S. C. § 1781, a treaty

to which the United States and the Federal Republic of Germany are parties. See Department of State, Treaties in Force 249 (1983). The trial court denied the motion, and the Michigan Court of Appeals denied leave to appeal. The applicant then sought review in the Michigan Supreme Court. Meanwhile, the trial court ordered that the depositions take place on or before August 30, 1982, and the plaintiffs filed notice to take the depositions on August 23, 1982. The applicant then applied to the Michigan Supreme Court for an emergency stay of the order and for immediate consideration of the order. When the state supreme court did not act, the applicant sought a stay from this Court, and on August 23, 1982, THE CHIEF JUSTICE granted a stay pending final disposition of the appeals before the Michigan Supreme Court. *Volkswagenwerk A.G.* v. *Falzon*, A–191, O. T. 1981 (order of August 23, 1982). He later denied a motion to vacate the stay. *Volkswagenwerk A.G.* v. *Falzon*, A–191, O. T. 1981 (order of September 2, 1982).

On February 22, 1983, the Michigan Supreme Court denied the applicant's application for leave to appeal. At that point, the stay entered by THE CHIEF JUSTICE expired by its own terms. The plaintiffs then filed notice of taking depositions, scheduling the depositions for May 2, 1983. On April 4, 1983, the applicant sought a stay of the depositions from the Michigan Supreme Court, pending disposition of its appeal to this Court of the earlier judgment of the Michigan Supreme Court. The state supreme court has not acted, so the applicant now seeks a stay from this Court pending disposition of the appeal here.

In granting the stay pending the disposition of the appeal to the Michigan Supreme Court, THE CHIEF JUSTICE must have concluded that there was a substantial chance that four Justices would agree to consider the case on the merits, that there was a significant chance that the applicant would prevail, and that the injury resulting from the denial of a stay would be irreparable. See generally *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in Chambers). Since the question on the merits is unchanged, it is essen-

tially the "law of the case" that a stay would be appropriate, unless, of course, the response presents new information. Cf. *Shlesinger* v. *Holtzman*, 414 U. S. 1321, 1324–1325, and nn. 3, 4 (1973) (Douglas, J., dissenting) (single Justice not empowered to vacate stay granted by another Justice); R. Stern and E. Gressman, Supreme Court Practice 866–867 (5th ed. 1978) (same). Consequently, the failure of the Michigan Supreme Court to act promptly should not prevent a member of this Court from entertaining an application to stay the order pending final disposition of the appeal in this Court. Proper deference to the Michigan Supreme Court, however, requires that that court have an opportunity to dispose of the stay application before it. Accordingly, I grant the stay pending disposition of the application for a stay in the Michigan Supreme Court.

CONSTITUTIONAL PROVISIONS

United States Constitution, Art VI, cl. 2.

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

TAKING OF EVIDENCE ABROAD

Convention adopted at the Eleventh Session of The Hague Conference on Private International Law October 26, 1968;

Opened for signature at The Hague March 18, 1970;

Signed on behalf of the United States of America July 27, 1970;

Retification advised by the Senate of the United States of America June 13, 1972;

Ratified by the President of the United States of America July 15, 1972;

TIAS 7444

Ratification of the United States of America deposited with the Ministry of Foreign Affairs of the Netherlands August 8, 1972;

Proclaimed by the President of the United States of America September 15, 1972;

Entered into force with respect to the United States of America October 7, 1972.

By the President of the United States of America

Considering That:

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted at the Eleventh Session of The Hague Conference on Private International Law on October 26, 1968, was opened for signature at The Hague on March 18, 1970, and was signed for the United States of America on July 27, 1970, the text of which in the French and English languages is annexed;

The Senate of the United States of America by its resolution of June 13, 1972, two-thirds of the Senators present concurring, gave its advice and consent to the ratification of that Convention;

The President ratified the Convention on July 15, 1972, and the instrument of ratification was deposited with the Ministry of Foreign Affairs of the Netherlands on August 8, 1972;

Article 37 of the Convention provides that it shall enter into force on the sixtieth day after the deposit of the third instrument of ratification; and

The Convention accordingly will enter into force for the United States of America on October 7, 1972, instruments of ratification having been deposited by Denmark and Norway on June 20, 1972 and August 3, 1972, respectively;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to the end that it shall be observed and

fulfilled with good faith on and after October 17, 1972 by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fifteenth day of September in the year of our Lord one thousand nine hundred seventy-two and of the Independence of the United States of America the one hundred ninety-seventh.

RICHARD NIXON

By the President:
WILLIAM P. ROGERS
Secretary of State

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I—LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not

intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which

transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its inter-

nal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence —

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that —

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II — TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territoy of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evi-

dence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if —

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if —

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence —

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Aticle 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privi-

leges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above

paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from —

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from —

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 [1] and the 1st of March 1954, [2] this Convention shall replace Articles 8-16 of

[1] 99 *British Foreign and State Papers* 990.
[2] 286 UNTS 205.

the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) Declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

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[1] TS 993; 59 Stat. 1055.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.[1]

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

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[1] Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at the Hague on Feb. 6, 1913.

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorized therto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

A. The Government of the Federal Republic of Germany makes the following declarations in accordance with paragraph 1 of Article 33 of the Convention of 18th March 1970:

The Federal Republic of Germany makes the reservation provided for in the first sentence of paragraph 1 of Article 33 of the Convention excluding the application of the provisions of paragraph 2 of Article 4 of the Convention. Letters of Request to be executed under Chapter 1 of the Convention must, in accordance with paragraphs 1 and 5 of Article 4 of the Convention, be in the German language or be accompanied by a translation into that language.

The Federal Republic of Germany declares in accordance with the option provided for in the first sentence of paragraph 1 of Article 33 of the Convention to make a reservation excluding the application of the provisions of Chapter II of the Convention that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.

B. The Government of the Federal Republic of Germany makes the following declarations pursuant to Article 35 of the Convention of 18th of March 1970:

(1) The authority competent to execute a Letter of Request

shall be the local court (Amtsgericht) in whose district the official act is to be performed.

Letters of Request shall be addressed to the Central Authority of the Land in which the respective request is to be executed. The Central Authority pursuant to Article 2 and paragraph 2 of Article 24 of the Convention shall be for

Baden-Wurttemberg
das Justizministerium Baden-Württemberg (The Ministry of Justice of Baden-Württemberg), D 7000 Stuttgart

Bavaria
das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 Munchen

Berlin
der Senator für Justiz (The Senator of Justice), D 1000 Berlin

Bremen
der Präsident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen

Hamburg
der Präsident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg

Hesse
der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden

Lower Saxony
der Niedersächsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover

Northrhine-Westphalia
der Justizminister des Landes Nordrhein-Westfalen (The Minister of Justice of the Land Northrhine-Westphalia), D 4000 Dusseldorf

Rhineland-Palatinate
das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz

Saarland
der Minister für Rechtspflege (The Minister of Justice), D 6600 Saarbrucken

Schleswig-Holstein
der Justizminster des Landes Schleswig-Holstein (The Minister of Justice of the Land Schleswig-Holstein), D 2300 Kiel

(2) Pursuant to Article 8 of the Convention, the Government of the Federal Republic of Germany declares that members of the requesting court of another Contracting State may be present at the execution of a Letter of Request by the local court if prior authorization has been given by the Central Authority of the Land where the request is to be executed.

(3) The taking of evidence by diplomatic officers or consular agents pursuant to paragraph 1 of Article 16 of the Convention which involves nationals of a third State or stateless persons shall be subject to permission from the Central Authority of the Land where the evidence is to be taken. Pursuant to paragraph 2 of Article 16 of the Convention, permission shall not be required if the national of the third State is also a national of the State of the requesting court.

(4) A commissioner of the requesting court may not take evidence pursuant to Article 17 of the Convention unless the Central Authority of the Land where the evidence is to be taken has given its permission. Such permission may be made subject to conditions. The local court in whose district official acts would have to be performed by virtue of a Letter of Request in the same matter shall be entitled to control the preparation and the actual taking of the evidence. Under the second sentence of Article 19 of the Convention, a member of the court may be present at the taking of the evidence.

(5) The Federal Republic of Germany declares in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

Rule 302 Depositions Pending Action.

.1 When Depositions May Be Taken. After commencement of an action in any court, any party may take the testimony of any person, including a party, by deposition on oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes.

.2 Scope of Examination.

(1) Persons taking depositions unless for good cause otherwise shown as provided by sub-rules 306.2 and 306.4, shall be permitted to examine the deponent regarding any matter not privileged which is admissible under the rules of evidence governing trials and relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. If a party claims privilege on the part of the testimony of a witness at the taking of the deposition and the witness is not required to answer the question, the party claiming the privilege may not at the trial offer the testimony of the witness pertaining to the evidence objected to at the deposition.

(2) If the parties so stipulate in writing or on the record, depositions may be taken regarding any matter, at any time or place, and in any manner, and when so taken may be used like other depositions. The deposition of a person confined in prison or of a patient in the state homes, institutions, or hospitals for the mentally ill, mentally handicapped, or epileptic, or any other state hospital, home, or institution may be taken only by leave of court on such terms as the court provides.

.3 Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial.

.4 Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any

party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any 1 of the following provisions:

(1) Any deposition may be used by any party for the purpose of impeaching the testimony of deponent as a witness.

(2) The deposition of a party or anyone who at the time of the transaction or occurrence out of which the action arose or at the time of taking the deposition was an officer, director, employee, or agent of any party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, when properly filed in accordance with sub-rule 306.6(1) or sub-rule 307.2, may be used by any party for any purpose if the court finds: [1] that the deponent is an expert witness; or [2] that the witness is dead; or [3] that the witness is at a greater distance than 50 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or [4] that the witness is unable to attend or testify because of age, sickness, insanity, infirmity, or imprisonment; or [5] that the witness is not subject to process or that the party offering the deposition has been unable to procure the attendance of witnesses by subpoena; or [6] upon motion and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of this state, or of any state, or of the United States has been dismissed, and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter when duly filed as if originally taken therefor.

.5 Objections to Admissibility. Subject to the provisions of sub-rule 308.3, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would

require the exclusion of the evidence if the witness were then present and testifying.

.6 Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in sub-rule 302.4(2). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

.7 Depositions of Expert Witnesses. [*GCR 302.7 applies in Wayne County only.*] All expert witnesses may be deposed by the party seeking to offer such witnesses' testimony within the time limits provided in special rules 314.1 and 314.2. Such depositions may be stenographically recorded, may be taken by video tape machines, or may be taken by other electronic means. In the absence of or failure of the expert witness to appear at trial, such deposition or video tape of such deposition may be offered as evidence at the trial. No adjournment of trial shall be granted because of unavailability of expert witnesses at the time of trial.

.8 Depositions by Expert Witnesses. In the Circuit Court for the County of Genesee all expert witnesses may be deposed by the party seeking to offer such witnesses' testimony within the time limits provided by local rule. Such depositions may be stenographically recorded, may be taken by video tape machines, or may be taken by other electronic means. In the absence of or failure of the expert witness to appear at trial, such deposition or video tape of such deposition may be offered as evidence at the trial. No adjournment of trial shall be granted because of unavailability of expert witnesses at the time of trial.

Rule 305 Subpoena for Taking Depositions; Place of Examination.

.1 Action Pending in This State. After proof of service of the notice provided for in sub-rule 303.1, sub-rule 306.1, or sub-rule 307.1, the clerk of the court in the county in which the deposition is to be taken or the clerk of the court in which the action is pending shall issue subpoenas upon request and in the manner provided by sub-rule 506.4 for the person named or described in such notice. The subpoena may command the person or party to whom it is directed to produce designated books, papers, documents, or tangible things which constitute

or contain evidence related to any of the matters within the scope of the examination permitted by sub-rule 302.2, but in that event the subpoena will be subject to the provisions of sub-rule 306.2, and the court from which the subpoena was issued, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing books, papers, documents, or other tangible things. Service of such subpoenas shall be made as provided in sub-rule 506.5. Service on a party or his attorney, of notice of the taking of the deposition of a party, or director, or trustee, officer or employee of a corporate party, is sufficient to require the appearance of the deponent and a subpoena need not be issued.

.2 Place of Examination. A deponent may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at any other convenient place that is fixed by order of the court. The court may, in an action pending in this state, order a non-resident plaintiff or an officer or managing agent thereof to appear at a designated place in this state or elsewhere for the purpose of having his deposition taken, upon any terms and conditions that may be just, including payment by defendant of the reasonable expenses of travel, meals, and lodging incurred by the deponent in so attending. Whenever it is shown that the deposition of a non-resident defendant cannot be taken in the state of his residence, the court may order him or an officer or managing agent of such defendant to appear at a designated place in this state or elsewhere for the purpose of having his deposition taken upon any terms and conditions that may be just, including payment by plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in so attending.

.3 Petition to Non-Michigan Courts to Compel Testimony. When the place of examination is in another state, territory, or country, the party desiring to take the deposition may petition any court of such state, territory, or country for a subpoena or equivalent process to require the deponent to attend the examination.

.4 Action Pending in Another State, Territory, or Country. Any officer or person authorized by the laws of another state, territory, or country to take any deposition in this state, with or without a commission, in any action pending in a court of that state, territory, or country may petition a court of record in the county in which the

deponent resides or is employed or transacts his business in person or is found for a subpoena to compel the giving of testimony by him. The court may hear and act upon the petition with or without notice, as the court directs.

Rule 306 Depositions Upon Oral Examination.

.1 Notice of Examination: Time and Place. Unless otherwise provided for by stipulation in writing or on the record, the party desiring to take the deposition of any person upon oral examination in accordance with sub-rule 302.1 shall give reasonable notice in writing to every other party to the action. Such notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party served by notice, the court may for cause shown enlarge or shorten the time. The court may regulate at its discretion the time and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice.

.2 Orders for the Protection of Parties and Deponents. Upon motion seasonably made by either party or by the person to be examined and upon reasonable notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers and counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression. The court shall not order the production or inspection of any writing prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial or production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice, except as provided in sub-rule 310.1

(4). The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories.

.3 Record of Examination; Oath; Objections.

(1) The person before whom the deposition is to be taken shall put the witnesses on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witnesses.

(2) If the court permits or the parties stipulate, the deposition may be taken by mechanical, photographic, or electronic means. Such a deposition in the form of a recording may be filed with the court as are other depositions. The court order or stipulation shall provide the details of the recording and preservation. Before a deposition taken in this manner can be used in court it shall be transcribed unless the court enters an order waiving transcription.

(3) In other cases the testimony shall be taken stenographically and, if requested by 1 of the parties, transcribed. Where transcription is requested by a party other than the 1 taking the deposition, the court may order the expense of transcription or a portion thereof paid by the party making the request. While such testimony is being taken stenographically, any party, as a matter of right, may also make a record thereof by non-secret mechanical or electronic means and any use thereof in court shall be within the discretion of the court. A person making such record shall furnish a duplicate of the record to any other party at the request and expense of the other party.

(4) All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom taken. Subject to the limitation imposed by an order under sub-rules 306.2 or 306.4, evidence objected to shall be taken subject to the objections.

(5) In lieu of participating in the oral examination, parties may transmit written interrogatories to the person conducting the examination, who shall propound them to the witness and record the answers verbatim.

.4 Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the de-

ponent and upon a showing that the examination is being conducted in bad faith, in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party, or that the matter inquired about is privileged, the court in which the action is pending or the court in the county where the deposition is being taken may order the person conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in sub-rule 306.2. If the order made terminates the examination, it shall be resumed thereafter only upon order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order, the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

.5 Submission to Witnesses: Changes; Signing. When the deposition is transcribed and certified in accordance with sub-rule 306.6, it need not be submitted to the witness for his examination and signature unless 1 of the parties or the witness makes a request therefor. When such request is made, the deposition shall be submitted to the witness, or a reasonable opportunity shall be given to the witness at the place of the taking of the deposition, to examine the deposition, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by the person conducting the examination with a statement of the reasons given by the witness for making them.

After such examination the deposition shall be signed by the witness, unless he refuses to sign. If the deposition is not signed by the witness, the person conducting the examination shall sign it and state on the record the fact that no request for examination and signature was made or that the witness refused to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under sub-rule 308.4 the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

.6 Certification and Filing; Copies; Notice of Filing.

(1) When a deposition is transcribed, the person conducting the examination or the stenographer shall certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. When 1 of the parties requests that the deposition be filed for purposes of perpetuation, the person conducting the examination shall securely seal the deposition in an envelope indorsed with

the title of the action and marked "Deposition of (here insert the name of the witness)" and shall promptly file it with the court in which the action is pending or send it by mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the person conducting the examination shall furnish a copy of the deposition to any party or to the deponent.

(3) When the deposition is filed, the clerk of the court shall give prompt notice of its filing to all other parties unless the parties agree otherwise by stipulation in writing or on the record.

.7 Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party who gives notice for the taking of a deposition fails to attend and proceed therewith, and another party attends in person or by attorney pursuant to the notice, the court may order the party giving such notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party who gives notice for the taking of a deposition of a witness, other than a party or officer or agent of a party, fails to serve a subpoena on him, and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving such notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

[Amended Dec. 2, 1963; July 13, 1965; Nov. 12, 1971.]

FEDERAL REPUBLIC OF GERMANY

Judicial Assistance: Taking of Evidence

Agreements effected by exchange of notes
Dated at Bad Godesberg and Bonn February 11, 1955 and January 13 and October 8, 1956;
Entered into force October 8, 1956.
And exchange of notes
Dated at Bonn October 17, 1979 and February 1, 1980;
Entered into force February 1, 1980.

The Office of the United States High Commissioner for Germany to the German Federal Ministry of Foreign Affairs

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs and has the honor to bring the following matter to the attention of the appropriate Federal Government officials.

Prior to 1939 it is understood that German law prohibited in general the taking of testimony of German nationals by foreign consular officers stationed in Germany. Therefore, it was interpreted then under Article 22 of the 1923 Treaty of Friendship, Commerce, and Consular Rights[1] between the United States and Germany that American consular officers had the right to take depositions of American citizens, occupants of American vessels, and aliens having permanent residence in the United States, but that the taking of testimony of other categories of persons was forbidden by German law.

The Office of the United States High Commissioner for Germany would appreciate knowing whether German law now in effect in the Federal Republic still prohibits the taking of testimony of German nationals by foreign consular officers. This inquiry is made because there is nothing in the 1923 Treaty which prohibits the taking of such testimony. In the absence of a current German law prohibiting it or a specific request from the German authorities that such testimony not be taken, American consular officers in Germany will continue as they have since the war to take the voluntary depositions of all nationalities.

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[1] Signed Dec. 8, 1923. TS 725; 44 Stat. 2131; 8 Bevans 153.

Inasmuch as this is a pressing matter, an urgent reply would be greatly appreciated.

The Office of the United States High Commissioner for Germany takes this occasion to assure the Federal Ministry of Foreign Affairs of its highest consideration.

BAD GODESBERG-MEHLEMER AUE
February 11, 1955

The German Ministry of Foreign Affairs to the American Embassy

511-04/80 12 586/55 III

Verbalnote

Das Auswärtige Amt beehrt sich, unter Bezugnahme auf die Verbalnoten der Botschaft der Vereinigten Staaten von Amerika vom 11. Februar und 7. März 1955 sowie auf seine Verbalnote vom 31. März 1955 folgendes mitzuteilen:

Im Hinblick auf die von den Vereinigten Staaten gewährte Gegenseitigkeit werden in Zukunft Einwendungen gegen die Befragung deutscher oder anderer nichtamerikanischer Staatzangehöriger durch amerikanische Konsuln in der Bundesrepublik nicht erhoben werden.

Es wird dabei davon ausgegangen,

1.) daß auf die zu befragende Person keinerlei Zwang, weder zum Erscheinen, noch zur Aussage ausgeübt wird, insbesondere

   a) die Bitte, Auskunft zu erteilen, nicht als "Ladung" und die Befragung nicht als "Vernehmung" bezeichnet wird,

   b) für den Fall des Nichterscheinens oder der Verweigerung der Auskunft keinerlei Zwangsmaßnahmen angedroht werden,

   c) auf die zur Auskunft bereite Person nicht in irgendeiner Form ein Zwang ausgeübt wird, Protokolle oder sonstige Vermerke über mündlich erteilte Auskünfte zu unterschreiben,

2.) daß die Befragung in den Räumen der amerikanischen Konsulate stattfindet,

3.) daß die zu befragende Person die Möglichkeit hat, sich von einem Rechtsbeistand begleiten zu lassen.

Das Auswärtige Amt benutzt auch diesen Anlaß, die Botschaft der Vereinigten Staaten von Amerika erneut seiner aus gezeichneten Hochachtung zu versichern.

BONN, *den 13. Januar 1956.*

L.S.

AN DIE
BOTSCHAFT
DER VEREINIGTEN
STAATEN VON AMERIKA
BAD GODESBERG-MEHLEM

The German Ministry of Foreign Affairs to the American Embassy

AUSWARTIGES AMT

5o1-511-04/80 I.-12880/56

Verbalnote

Das Auswärtige Amt beehrt sich, unter Bezugnahme auf die dortige Verbalnote vom 23. Juli 1956-28—und im Anschluß an seine Verbalnote vom 8. August 1956—5o1-511-04/80—Vernehmungen/12o21/56-betreffenddie Zuetändigkeit der amerikanischen Konsuln zur Befragung deutscher Steatsangehöriger, folgendes mitzuteilen:

Unter Aufhebung der im vorletzten Absatz der Verbalnote des Auswärtigen Amts vom 15. Mai 1956-5o1-511-04/80-S-11195/56—festgelegten Einschränkung erklärt die Bundesregierung—unter der Veraussetzung der Gegenseitigkeit—ihr Einverständnis such camit, daß die amerikanischen Ermittlungsbeamten nicht amerikanische Personen zum Zwecke der Befragung im —une der Verbalnote vom 13. Januar 1956-5o1-511-04/80 12586/55 III—in ihrer Wohnung und in ihren Geschäftsräumen aufsuchen, sefern die zu befragenden Personen eine Befragung in der eigenen Wohnung oder in den eigenen Geschäftsräumen ausdrücklich erbitten oder sich mit einer derartigen art der Befragung ausdrücklich einverstanden erklären.

Das Auswärtige Amt benutst auch diesen Anlaß, die Betschaft der Vereinigten Staaten von Amerika erneut seiner ausgezeichneten Hochachtung zu versichern.

BONN, *den 8. Oktober 1956*

L.S.

AN DIE
BOTSCHAFT
DER VEREINIGTEN STAATEN VON AMERIKA
BAD GODESBERG-MEHLEM

TRANSLATION

THE MINISTRY OF FOREIGN AFFAIRS
501-511-04/80 12 586/55 III

Note Verbale

With reference to the notes verbales of the Embassy of the United States of America of February 11 and March 7, 1955,[1] and to its own note verbale of March 31, 1955,[1] the Ministry of Foreign Affairs has the honor to state as follows:

In consideration of the reciprocity granted by the United States, no objections will in future be raised to the questioning of German or other non-American nationals by American consuls in the Federal Republic.

In this connection, it is assumed that:

1) No compulsion of any kind will be used to force the person to be questioned either to appear or to make statements; specifically,

   (a) the request to give information will not be called a "summons", and the questioning will not be called an "interrogation";

   (b) there will be no threat of compulsory measures in the event of non-appearance or refusal to give information;

   (c) a person willing to give information will in no way be compelled to sign records or other written statements of information given orally;

2) The questioning will take place on the premises of an American consulate;

3) The person to be questioned will be afforded the opportunity to be accompanied by counsel.

---

[1] Not printed.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurance of its high consideration.

Bonn, January 13, 1956.

L.S.

Embassy of the United States of America
Bad Bodesberg-Mehlem

TRANSLATION

THE MINISTRY OF FOREIGN AFFAIRS
501-511-04/80 I.-12580/56

Note Verbale

With reference to your note verbale of July 23, 1956[1] - 28 - and, further, to its own note verbale of August 8, 1956[1] - 501-511-04/80-interrogations/12021/56 - regarding the authority of American consuls to question German nationals, the Ministry of Foreign Affairs has the honor to advise as follows:

Revoking the limitation contained in the next to the last paragraph of the note verbale of the Ministry of Foreign Affairs of May 15, 1956 - 501-511-04/80 -S-11195/56 -, the Government of the Federal Republic also agrees, on the condition of reciprocity, to visits by American investigating officers to non-Americans for the purpose of questioning within the meaning of the note verbale of January 13, 1956 - 501-511-04/80 12586/55 III - at the latter's homes and places of business, provided the persons to be questioned expressly request questioning to be conducted at their homes or places of business, or expressly consent to this form of questioning.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurance of its high consideration.

Bonn, October 8, 1956

L.S.

Embassy of the
United States of America
Bad Godesberg - Mehlem

The German Ministry of Foreign Affairs to the American Embassy

AUSWÄRTIGES AMT
512-521.60 USA

Verbalnote

Das Auswärtige Amt beehrt sich, der Botschaft der Vereinigten Staaten von Amerika unter Bezugnahme auf die Verbalnote des Auswärtigen Amtes vom 15. November 1978 - 512-521.60 USA - betreffend die Rechtshilfe in Zivil- und Handelssachen mitzuteilen, daß die durch Notenwechsel vom 11. Februar 1955, 13. Januar 1956 und 8. Oktober 1956 zwischen dem Auswärtigen Amt und der Botschaft der Vereinigten Staaten von Amerika getroffene Absprache über die Befragung deutscher oder anderer nichtamerikanischer Staatsangehöriger durch amerikanische Konsularbeamte in der Bundesrepublik Deutschland unter den dort genannten Voraussetzungen deutscherseits weiterhin als gültig angesehen wird, nachdem das Haager Übereinkommen vom 18. März 1970 über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen am 26. Juni 1979 für die Bundesrepublik Deutschland in Kraft getreten ist.

In den Noten des Auswärtigen Amtes vom 13. Januar 1956 und 8. Oktober 1956 - 501-511-04/00 - sind folgende Voraussetzungen für die Befragung deutscher oder anderer nichtamerikanischer Staatsangehöriger genannt worden:

Die Vereinigten Staaten von Amerika gewähren die Gegenseitigkeit.

Es wird davon ausgegangen,

An die
Botschaft der
Vereinigten Staaten von Amerika

1. daß auf die zu befragende Person keinerlei Zwang, weder zum Erscheinen, noch zur Aussage, ausgeübt wird, insbesondere

   a) die Bitte, Auskunft zu erteilen, nicht als "Ladung" und die Befragung nicht als "Vernehmung" bezeichnet wird,

   b) fur den Fall des Nichterscheinens oder der Verweigerung der Asukunft keinerlei Zwangsmaßnahmen angedroht werden,

   c) auf die zur Auskunft bereite Person nicht in irgendeiner Form ein Zwang ausgeübt wird, Protokolle oder sonstige Vermerke über mündlich erteilte Auskünfte zu unterschreiben,

2. daß die Befragung nur dann in der Wohnung oder in den Geschäftsräumen der zu befragenden Personen stattfindet, sofern die zu befragenden Personen eine Befragung in der eigenen Wohnung oder in den eigenen Geschäftsräumen ausdrücklich erbitten oder sich mit einer derartigen Art der Befragung ausdrücklich einverstanden erklären,

3. daß die zu befragende Person die Möglichkeit hat, sich von einem Rechtsbeistand begleiten zu lassen.

Das Auswärtige Amt nutzt diesen Anlaß, die Botschaft der Vereinigten Staaten von Amerika erneut seine ausgezeichnete Hochachtung zu versichern.

Bonn, 17. Oktober 1979

The American Embassy to the German Ministry of Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA

Bonn, Germany

No. 40

The Embassy of the United States of America presents its compliments to the Auswaertiges Amt of the Federal Republic of Germany and has the honor to refer to the Note Verbale of the Auswaertiges Amt (512-521.60 USA) dated October 17, 1979, which reads, in the English language translation, as follows:

> With reference to its Note Verbale of November 15, 1978[1] (512-521.60 USA) concerning legal assistance in civil and commercial matters, the Foreign Office has the honor of informing the Embassy of the United States of America that the agreement between the Foreign Office and the Embassy of the United States of America on the questioning, by consular officers of the United States, of German or other non-American citizens in the Federal Republic of Germany, under the conditions stipulated there, which was concluded by the exchange of notes on February 11, 1955, January 13, 1956, and October 8, 1956, is still considered valid by the German side, as the Hague convention of March 18, 1970,[2] on the taking of evidence abroad in civil or commercial matters, became effective for the Federal Republic of Germany on June 26, 1979.

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[1] Not printed.
[2] TIAS 7444; 23 UST 2555.

In the Foreign Office notes of January 13, 1956, and October 8, 1956 (501-511-04/80) the following prerequisites for the questioning of German or other non-American citizens were mentioned:

The United States of America grants reciprocity. It is expected

(1) that no compulsion is brought to bear on the person to be questioned to make him appear or provide information, more specifically,

(a) that the request to provide information is not called a "summons" and that the questioning is not called "interrogation;

(b) that no coercive measures are threatened in the event that a person does not appear or refuses to provide information;

(c) that no compulsion whatsoever is brought to bear on a person ready to provide information to make him sign protocols or other records of orally provided information;

(2) that the questioning only takes place in the home, office or shop of persons to be questioned if said persons expressly ask to be questioned there or expressly state their agreement with this form of questioning;

(3) that the person to be questioned has the possibility of having himself accompanied by a lawyer.

The Foreign Office avails itself of this opportunity once again to assure the Embassy of the United States of its high esteem.

The Embassy has the further honor to inform the Auswaertiges Amt that the United States Department of State shares the legal opinion of the Auswaertiges Amt as set out in its Note Verbale as it is translated in this Note.

The Embassy of the United States of America avails itself of this opportunity to renew to the Auswaertiges Amt the assurances of its highest consideration.

Embassy of the United States of America

Bonn, February 1, 1980

THE AMBASSADOR
of the Federal Republic of Germany

Washington, June 25, 1982

The Honorable Mary S. Coleman
Supreme Court of the State
of Michigan
Appeal Box 30052
Lansing, Michigan 48909

Re: Falzon, et al. vs. Volkswagen of America, Inc., et al.
Docket No. 69595 & 69596

Dear Judge Coleman:

The Foreign Office of the Federal Republic of Germany has been made aware of an order by the Circuit Court of the County of Wayne in the case of Falzon vs. Home Insurance Co., Civ. Action No. 77, 722, 371 NP and Falzon v. Volkswagen of America, Inc., Civil Action No. 78, 803, 043 NP which is presently the subject of an application for permission to appeal to the Supreme Court of the State of Michigan. Because the order referred to raises grave questions of international law and contravenes German law and sovereignty, the Federal Republic of Germany is compelled to express its concern and wishes to bring to the attention of the Supreme Court of Michigan the position of the Federal Republic of Germany in this matter.

The subject order of the trial court calls for "depositions" to be taken in Germany of designated German citizens without regard to the requirements of German law, procedure and sovereignty and treaty provisions presently in force between the United States of America and the Federal Republic of Germany. The trial court's order, in fact, contravenes German law and the treaty provisions.

The United States and the Federal Republic of Germany are parties to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The Convention, together with the provisions of ratification by the Federal Republic of Germany, establishes the legal framework and procedures for the

taking of evidence in Germany for use in civil matters pending in the United States. The Convention sets forth the only procedures sanctioned by the German government for the taking of such evidence. The order in question not only contradicts the intergovermental procedures existing between the Federal Republic of Germany and the United States, but also contravenes the principles of international law.

The Circuit Court's order of October 7, 1980 seeks to compel testimony by citizens and residents of the Federal Republic of Germany on German soil. The taking of evidence is an official act which the Federal Republic of Germany reserves exclusively to the judiciary. Any attempt to take evidence in the Federal Republic of Germany pursuant to the Michigan General Court Rules in contravention of the Hague Convention would violate applicable provisions of the German Criminal Code and would, more importantly, be considered an invasion of German sovereignty.

The order of the Circuit Court also refers to the "Notes Verbales of 1955" to control the course of taking the deposition. The exchange of notes only permits "questions" by consular officials, an "examination" in a formal procedural sense is not possible. This follows not only out of the text of the exchange, but rather also in that the "request to provide information" is only carried out on an absolutely voluntary basis and oaths may not be taken. The voluntary nature of the provisions of information is assumed by the exchange of notes in that compulsion may not be exercised in any manner, be it direct or indirect. "Questioning" may only be conducted by consular officials and interrogation by American attorneys involved in private civil litigation is not permitted. In view of the fact that the procedure permits only voluntary responses without compulsion, it depends upon the free will of the individual being questioned whether he wishes to answer the individual question or not.

The German-American exchange of notes of 1955/56 is not applicable to the taking of evidence by compulsion. The order of the Circuit Court seeks to compel the deposition of German citizens and to compel them to answer "all questions promulgated". The order is without force and effect in the Federal Republic of Germany and cannot be enforced.

The Embassy of the Federal Republic of Germany takes the liberty of expressing its legal position with the expectation that, since the order of the Circuit Court violates German law and sovereignty, the Supreme Court of Michigan will grant the pending petition to appeal in order to consider the applicable law and to avoid

acts inconsistent with the convention and the position of the German government.

Without waiving any rights of the Federal Republic of Germany, this Embassy or its personnel to diplomatic, sovereign or any other form of immunity, the Embassy of the Federal Republic of Germany in the United States of America respectfully makes this request and stands ready to consider any request the Supreme Court may have for further information or elucidation of the position of the Federal Republic of Germany in this matter.

Sincerely yours,

sign. Hermes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,

Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON
and RAMON FALZON, minors

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEES' MOTION TO DISMISS OR AFFIRM

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

APPENDIX

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THE INLAND PRESS, DETROIT, MICHIGAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEES' MOTION TO DISMISS OR AFFIRM

NOW COME Appellees, JOSEPH FALZON, et al, by and through their undersigned counsel, and hereby move this Honorable Court to dismiss or affirm the "appeal" filed by Appellant VOLKSWAGEN AKTIENGESELLSCHAFT, ("VWAG") and in support hereof submit that:

1. The state court rulings which Appellant seeks to have reviewed do not involve or decide the "validity" of any "Treaty . . . of the United States", as the validity of the Hague Treaty has been uniformly accepted by Appellees. Since the State decisions have involved nothing more than the construction and application of that Treaty to the facts of the instant case, Appellant's claims are not within the appellate jurisdiction conferred on this Court by 28 USC § 1257(1) and are reviewable, if at all, only by certiorari.

2. The State court rulings which Appellant seeks to have reviewed do not involve the "validity" of any "statute of [the] State", but only Appellant's claim that the General Court Rules of Michigan are inapplicable to it. Appellant's claims are therefore not within the appellate jurisdiction conferred on this Court by 28 USC § 1257(2) and are reviewable, if at all, only by certiorari.

3. The pre-trial order from which VWAG seeks to appeal is not a "final judgment", and is therefore not within the appellate jurisdiction conferred on this Court by 28 USC § 1257(1) and 28 USC § 1257(2), or the certiorari jurisdiction conferred by 28 USC § 1257(3).

4. It is manifest that the questions on which the pre-trial discovery order depends are so unsubstantial as not to need further argument.

5. The pre-trial discovery order from which Appellant seeks to appeal rests on an adequate non-federal basis.

6. In further support of their Motion to Dismiss or Affirm, Appellees incorporate by reference their Brief in Support of Motion to Dismiss or Affirm attached hereto.

ZEFF & ZEFF, P.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,

Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON
and RAMON FALZON, minors

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellant VWAG seeks to appeal from a pretrial order, entered in a Michigan product liability action, which allows the questioning of some of its German employees by American consular officials in Germany ("consular questioning"). The developments which culminated in this appeal are as follows.

On October 27, 1974, Appellees FALZON (plaintiffs in the pending Michigan lawsuit), were involved in an automobile

accident while riding in a Volkswagen microbus.[1] The accident occurred in Michigan where Appellees reside, where Appellant does business, and where the vehicle was purchased. Joseph Falzon and Barbara Falzon, husband and wife, were ejected from the vehicle, and both were rendered quadriplegics. Their four children also suffered serious injuries in the crash.

Appellees then filed a product liability action in Wayne County Circuit Court, a Michigan trial court of general jurisdiction. Among the defendants is VWAG, a West German Corporation which designed and manufactured the vehicle in West Germany, and then imported it to the United States for sale in Michigan. Appellees contend that negligence in the design of the microbus resulted in their injuries. The design features with which Appellees take issue are the windshield retention and adhesion system, the door latch system, lack of cross-wind stability, and rollover and passenger ejection characteristics.

At the time suit was filed, the American and German governments had adopted a bilateral agreement allowing consular questioning for the purpose of taking testimony in litigation pending abroad. This agreement is reflected in the Notes Verbales of 1955 and 1956 which are found at 61a-66a.

Meanwhile, a multi-national pact known as the Convention on Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter "Hague Treaty") had been promulgated. The Treaty set forth minimal procedures which each signatory nation agreed to extend to all other signatory nations ("the world at large"), while reserving the right of any two countries to permit more liberal procedures as among themselves.

The Treaty had been ratified by the American government prior to the commencement of this litigation, 28 USC § 1781,

[1]The contents of this Statement of the Case are taken primarily from the Certified Concise Statement of Facts and Proceedings issued by the trial judge on March 4, 1982, which is found as Appellant's Appendix, pp. 8a-22a.

but was not ratified by West Germany until June 26, 1979 (69a). In ratifying the Treaty, Germany declined to extend consular questioning privileges to the world at large (50a). A question then arose as to whether Germany thereby intended to revoke the consular questioning privileges which had previously been extended to America. Through diplomatic channels, both governments confirmed that the consular questioning privileges established by the Notes Verbales of 1955 and 1956 continued. The continuing agreement to consular questioning is reflected in the Notes Verbales of October 17, 1979 and February 1, 1980 (67a-71a).

On April 18, 1980, counsel for Appellees advised defense counsel that he would be scheduling depositions of Appellant's design engineers in Germany at a later date. For the next three months, counsel for Appellant concurred with this procedure (see 1b-4b). On July 23, 1980, with the depositions two weeks away, Appellant filed a Motion to Quash depositions, raising a number of objections, including the contention that the depositions sought by Appellees would offend the Hague Treaty.

Over the period July through December of 1980, the parties filed numerous pleadings addressed to the discovery issue. The respective arguments are summarized at 13a-20a. During this period, Appellant submitted affidavits from its employees who were the proposed deponents. A representative affidavit is found at 6b.

On October 7, 1980, the trial judge issued an order (24a-25a) permitting Appellees to attempt to obtain the testimony of the deponents. The Order reflects "this Court's desire for the Michigan General Court rules control of these proceedings as much as possible" and requires that "the Notes Verbales of 1955 will control the course of the taking of these depositions". On December 5, 1980, the trial court denied Appellant's Motion for Reconsideration of the October 7, 1980 Order. The trial court did not issue an opinion or otherwise explicate the basis

of its Orders of October 7, 1980 and December 5, 1980.

In due course, Appellant filed an Application for Leave to Appeal to the Michigan Court of Appeals.[2] The Application was denied without opinion on May 27, 1982 (3a). The Supreme Court of Michigan denied Appellant's Application for Leave to Appeal to that Court on February 22, 1983 (2a). This disposition was also without opinion.

At present, the Michigan product liability action remains pending, as trial has been adjourned until the resolution of the discovery issue. By Order of Justice O'Connor dated May 26, 1983, discovery proceedings have been stayed pending the disposition of Appellant's appeal to this Court.

OPINIONS AND ORDERS BELOW

The Michigan Courts have not issued any opinions regarding the issue which VWAG seeks to present. The pretrial Order of the Wayne County Circuit Court from which Appellant appeals is found at 24a-25a. The Order denying rehearing thereon is found at 23a. The Orders of the Michigan Court of Appeals and Michigan Supreme Court denying applications for leave to file an interlocutory appeal are respectively found at 3a-4a and 1a-2a.

JURISDICTION

Appellant VWAG relies on 28 USC § 1257(1), 28 USC § 1257(2) and 28 USC § 1257(3) as conferring on this Court jurisdiction to accept and decide its appeal. Appellees FALZON submit that no such jurisdiction is conferred by 28 USC § 1257.

---

[2]In the Michigan appellate system, an appeal of right exists from "all final judgments" of the Circuit Courts, GCR 1963, 806.1. Where the Circuit Court Order in question is not final, the dissatisfied litigant may seek leave to file an interlocutory appeal under GCR 1963, 806.2(2). Appellant's pleadings in the Michigan Court of Appeals sought a discretionary interlocutory appeal under Rule 806.2(2) rather than an appeal of right from a "final judgment" under Rule 806.1.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

I.

THE STATE COURT RULINGS DO NOT INVOLVE OR DECIDE THE VALIDITY OF THE HAGUE TREATY OR MICHIGAN STATUTES, AND THEREFORE NO APPELLATE JURISDICTION EXISTS UNDER 28 USC § 1257(1) or 28 USC § 1257(2).

In its Jurisdictional Statement, Appellant relies on 28 USC § 1257, which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> "For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

Given the alternative arguments proffered by Appellees in support of the Order, and the lack of any opinion by the state courts explicating the basis of the rulings now under attack, it is far from clear that any federal issues were ever resolved on the merits. Indeed, it is likely that the Michigan decisions were

predicated on adequate non-federal grounds (Argument IV, *infra*).

Even if it can be assumed *arguendo* that the trial court's orders reflect an implicit interpretation or construction of the body of law contained in the Hague Treaty and Notes Verbales, this implicit interpretation of federal law does not fall within the jurisdiction conferrerd by 28 USC § 1257(1). Appellate jurisdiction exists under § 1257(1) only where the "*validity* of a treaty" is drawn in question "and the decision is against its *validity*".

In the instant case, Appellees have never argued that the Hague Treaty is "invalid." The Michigan courts have never questioned the "validity" of the Treaty, and Appellant is unable to point to anything in the state court proceedings which even remotely suggest that the Treaty has bene judicially invalidated.

To be sure, this case involves questions as to the interpretation, scope, or applicability of the Treaty, but such questions do not implicate the unquestioned "validity" of the statute. Stern & Gressman, Supreme Court Practice (5th ed), pp. 159-160 explains that appellate jurisdiction will not lie under 28 USC § 1257(1) to review a decision which does no more than implicitly interpret or apply a federal treaty or statute:

> "It is essential, for purposes of an appeal under § 1257(1), that the state court deny 'validity' to a federal treaty or statute. This means that the state court must directly inquire into and deny the power to make the treaty or to pass the statute. *See Baltimore & Potomac R. Co.* v *Hopkins,* 130 U.S. 210. To be appealable, the state court decision must hold the treaty or statute invalid in whole or in part as applied to the particular circumstances of the case. *Flournoy* v *Wiener,* 321 U.S. 253, 263. Such a holding must be explicit. Even though the alleged invalidity of the treaty or statute be timely and properly raised in the record, the state court must do something more than remain silent or ambiguous before a denial of validity will be ascribed to its action. The Supreme Court's jurisdiction under §1257(1) must

> rest upon far firmer ground than guesswork as to the nature of the state court decision. Moreover, it is not enough that the state court merely construes the treaty or statute so as to deny a claim thereunder, or that it views the facts so as to place the litigant outside the scope of the federal law."

As the State courts have never explicitly held the Hague Treaty invalid, Appellant's claims do not fall within the appellate jurisdiction conferred by 28 USC § 1257(1). Its appeal must therefore be dismissed and its claims, if reviewed at all, must be reviewed by certiorari.

Appellant's claims likewise fall beyond the appellate jurisdiction conferred by 28 USC § 1257(2). Such jurisdiction exists only where the "validity" of a "statute of any state" is unsuccessfully challenged as "repugnant to the . . . treaties . . . of the United States". In the instant case, Appellant has never challenged the "validity" of any Michigan enactment.

The critical provisions of state law are General Court Rules ("GCR 1963") 302.1 (permitting the deposition of "any person, including a party"), 305.1 (service of notice of taking deposition on a party or its attorney is sufficient to require appearance of that party's employees) and GCR 1963, 304.2[3] (9b). Rule 304.2 expressly authorizes the taking of depositions in a foreign country before a consular agent of the United States (the same procedure authorized by the Notes Verbales).[4] Appellant has never contended that the Michigan Court Rules are unconstitutional or invalid (see 13a-20a, summarizing the arguments presented to the trial judge).

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[3]The Michigan General Court Rules are promulgated by the Supreme Court of Michigan and govern Circuit Court procedure. For present purposes, it will be assumed that the General Court Rules constitute a "statute" as that term is used in 28 USC § 1257(2).

[4]Since Rule 304.2 expressly allows the procedure utilized by the trial court, Appellees are at a loss to explain the curious absence of that Rule from Appellant's Appendix (see 53a-60a). VWAG's failure to as much as cite GCR 1963, 304 in its Jurisdictional Statement or Appendix makes clear that the "validity" of that Rule is not "drawn in question".

Absent a direct attack on the validity of the Michigan General Court Rules, the appellate jurisdiction conferred by 28 USC § 1257(2) has been erroneously invoked. The most that can be said of Appellant's argument in the state courts is that it has accepted the *validity* of the Court Rules but asserted that federal rights prevent its application to it. Such an argument below does not trigger appellate jurisdiction under § 1257(2). As Stern & Gressman, Supreme Court Practice (5th ed), pp. 163-164 explains:

> "[I]t is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law. If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be had in the Supreme Court only via certiorari under §1257(3)."

Insofar as Appellant asserts an appeal under 28 USC § 1257(1) or (2), its claims are outside the scope of the Court's appellate jurisdiction. Its quest for review, if cognizable at all, is cognizable only by certiorari. Appellant's appeal must therefore be dismissed.

II.

A PRE-TRIAL ORDER, WHICH MAY LATER BE REVIEWED BY THE STATE APPELLATE COURTS ON AN APPEAL OF RIGHT, IS NOT A "FINAL JUDGMENT" AND IS THEREFORE NOT WITHIN THE JURISDICTION CONFERRED BY 28 USC § 1257.

Central to the jurisdiction established by 28 USC § 1257 is the limitation that review may had only of "final judgments or decrees rendered by the highest court of a State". If the order in question is not a "final judgment", this Court lacks jurisdiction to review the dissatisfied litigant's substantive arguments

by either appeal or certiorari. *San Diego Gas & Electric Co* v *San Diego*, 450 US 621, 630, fn. 10 (1981).

Traditionally, the vexing "finality" requirement of 28 USC § 1257 and 28 USC § 1291 has been viewed as requiring that the decision to be reviewed "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment", *Coopers & Lybrand* v *Livesay*, 437 US 463, 467 (1978); *Firestone Tire & Rubber Co* v *Risjord*, 449 US 368 (1981). Plainly, a pretrial discovery order presented for review prior to trial on the merits is not "final" in the traditional sense.

Apparently recognizing the non-finality of the order, VWAG adverts to *Cox Broadcasting Corp* v *Cohn*, 420 US 469 (1974) and *Cohen* v *Beneficial Industrial Loan Corp*, 337 US 541 (1949) as supportive of its invocation of the Court's § 1257 jurisdiction (Jurisdictional Statement, pp. 2-3, fn. 1). the principles addressed in those cases do not support the claim that jurisdiction exists to review the Order involved in this case.

Cox Broadcasting Corp recognized limited circumstances justifying departure from the traditional interpretation of "finality". Among the requirements necessary to meet the *Cox Broadcasting Corp* relaxed test of finality is a showing that, while the totality of the litigation has not been concluded, the federal issue has been "finally" resolved.[5] That test is plainly

[5]This Court has recognized four distinct situations in which a state court order may be deemed "final" despite the fact that further state court proceedings are required. *Cox Broadcasting Corp*, 420 US at 479-485; *Flynt* v *Ohio*, 451 US 619 (1981). Three of these situations arise where "the federal issue [is] finally decided by the highest court in the State" (*Cox Broadcasting Corp*, 420 US at 480), "where the federal claim has been finally decided [and] later review of the federal issue cannot be had" (*Id.*, 420 US at 481) or where "the federal issue has been finally decided in the state courts [and] reversal of the state court on the federal issue would be preclusive of any further litigation" (*Id.*, 420 US at 482-483). All three of these situations contemplate that the federal issue has been so firmly resolved that it cannot be reexamined or later reviewed in a state court appeal. The instant case fits none of these three categories.

The fourth category of *Cox Broadcasting Corp* finality consists of "those cases in which there are further proceedings . . . but . . . the federal issue is conclusive or the outcome of further proceedings is pre-ordained" (*Id.*,

unmet in the instant case.

The decision of the trial judge is not necessarily the "final" word from the Circuit Court on the federal questions. While the case remains pending, the Circuit Court retains the power to modify or vacate the orders which Appellant seeks to have reviewed, GCR 1963, 518.2. Thus, the Orders in question are not necessarily the "final" decisions of the Circuit Court on federal questions.

Nor have the Michigan appellate courts "finally" resolved even the federal questions. They have done nothing more than decline to grant *interlocutory* appellate review.[6] After trial on the merits, VWAG may pursue an appeal of right under GCR 1963, 806.1. At that time, the State appellate courts *will* "finally" decide the federal question on its merits. At *that* juncture this Court's jurisdiction may be properly invoked. As the final judgment of the Michigan appellate courts has not yet been rendered, Appellant's quest for review by this Court is premature and is not within the "final judgment" jurisdiction of 28 USC § 1257.

Finally, this case does not meet the "collateral order" exception first recognized in *Cohen*. To come within that exception,

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420 US at 479). In the instant case, even if all federal issues are resolved favorable to Appellant this will not conclude or preordain the outcome of the pending product liability suit.

Where, as here, none of the four criteria are met, the necessity of further state court proceedings precludes construction of an interlocutory order as a "final judgment". An appeal or petition for certiorari must be dismissed for failure to meet the "final judgment" threshold necessary to invoke §1257 jurisdiction. *Flynt, supra.*

[6]Under Michigan appellate procedure, a dissatisfied litigant can pursue a discretionary appeal from any Circuit Court order which is not a "final judgment appealable as of right", GCR 1963, 806.2(2). VWAG's reliance on this provision in the Michigan appellate courts reflects its recognition that the discovery orders are not a "final judgment". Where the Court of Appeals declines to entertain a discretionary interlocutory appeal, the disgruntled litigant may nonetheless raise the same questions on an appeal of right from a "final judgment", GCR 1963, 806.1. In short, Michigan appellate procedure assures that if Appellant suffers an adverse judgment it may insist that the appellate courts resolve the merits of its federal arguments on an appeal of right.

three circumstances must exist, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 US at 468. See also *Firestone Tire & Rubber Co*, 449 US at 375.

For the reasons previously expressed, the discovery order does not "conclusively" determine the disputed question, for the order can be modified by the trial judge or reviewed on appeal from a final judgment. The discovery question is not "completely separate from the merits of the action"; indeed, the depositions seek to determine the merits and may be determinative of the merits if introduced at trial. And, finally, the decision may be effectively reviewed on appeal from a final judgment.

The Court has uniformly stated, at least in criminal cases, that a pre-trial discovery order is not a "final judgment" or "final order" and is therefore not ordinarily appealable. It is only where the discovery order is directed to a non-party witness that the "collateral order" doctrine may be invoked.[7] *Uni-*

[7]Where, as here, the discovery order is directed to a party, the order is not itself a final judgment. The party may elect to disobey the order and, upon the imposition of sanctions, *then* appeal from the final order. *Ryan, supra.* Thus, where the discovery order is directed to a party, an effective appeal from a final judgment exists and the third criterion of *Cohen* is unsatisfied.

A non-party witness against whom discovery is directed as unlikely to opt to disregard the order and then appeal from the final judgment imposing sanctions. And, there is a serious question whether a non-party has standing to appeal from a final judgment in the underlying litigation. These considerations reflect the critical distinction between discovery orders directed to non-parties (which may be appealable under the "collateral order" doctrine) and discovery orders directed to parties (which are non-appealable).

Appellees have repeatedly disavowed any coercion or intent to obtain any sanctions or other relief against the German deponents. Nothing will be done to them if they decline to appear. The only entity against which the Order is directed, and against which sanctions might be imposed, is VWAG, a party over which the Circuit Court has unquestioned personal and subject matter jurisdiction. As the discovery order is directed to a party, it cannot be appealed under the "collateral Order" doctrine as interpreted in *Ryan, Nixon* and *Jascalevich.*

ted States v *Ryan*, 402 US 530 (1971); *New York Times Co* v *Jascalevich*, 439 US 1317, 1318-1319 (1979); *United States* v *Nixon*, 418 US 683, 690-691 (1974).

If the Court perceives that its prior decisions do not foreclose Appellant's reliance on the "collateral order" doctrine, it must nonetheless decline to expand the scope of the doctrine. The most that can be said for VWAG's position is that it may be forced to decide whether to adhere to the order despite its discontent, or risk the imposition of sanctions to bring the matter to a head. This dilemma is no different than that faced by any litigant dissatisfied with an adverse ruling that is not immediately appealable. The dilemma is an inherent attribute of the finality requirement; it is no reason to ignore that requirement.

Arrayed against the inconvenience to Appellant are the host of compelling considerations which provide the underpinnings of the long-standing finality doctrine, all of which forcefully apply to the instant case. One principle underlying the final judgment requirement is the need to avoid the obstruction of meritorious claims or impediment to ongoing judicial proceedings that interlocutory appeals engender,[8] *Firestone Tire & Rubber Co*, 449 US at 374; *United States* v *Nixon*, 418 US at 690. Others are the need to accord deference to the trial bench and avoid undermining the authority of a trial court,[9] *Firestone Tire & Rubber Co, supra*, and the need to promote the efficient administration of justice[10], *Firestone Tire & Rubber Co, supra*;

[8]In the instant case, Appellees have not yet received a trial on the merits on their attempt to obtain redress for the catastrophic injuries sustained nine years ago. The record is rife with evidence of VWAG's efforts to obstruct meaningful discovery in this and other American product liability actions.

[9]Although the international facets may be interesting, the discovery order in question is typical of the sort of pre-trial ruling which trial courts across the nation are called on to make on a daily basis.

[10]In view of the aggressive litigation stance taken by Appellant, it is virtually certain that this is not the last appellate salvo. The efficient administration of justice, particularly for an overloaded Court such as this, is far better served by awaiting final judgment so that all issues can be resolved in a single appeal than by repeated piecemeal appeals that, by design or happenstance, protract the ultimate termination of the litigation.

United States v *Nixon, supra.* Still another underlying policy is to avoid protracting the ultimate termination of the litigation[11], *United States* v *Nixon, supra.* Finally, due deference to the state courts dictates that this Court wait until final judgment, until the state courts have fully and finally resolved the federal issues, before involving itself in pending state litigation. The full arrary of policy considerations underlying the "final judgment" limitations of 28 USC § 1257, when considered against the more limited policies relied on by Appellant,[12] dictate that the pretrial discovery order not be deemed within the "collateral order" doctrine announced in *Cohen.*

In sum, the pretrial discovery order is not a "final judgment". It may not be reviewed by appeal or certiorari at this juncture, as it is not within the jurisdiction established in 28 USC § 1257. Viewed as either an appeal or petition for certiorari, Appellant's pleadings must be dismissed as beyond the Court's jurisdiction.

III.
THE QUESTIONS ON WHICH THE DECISIONS OF THE STATE COURTS DEPEND ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

At the core of Appellant's argument is the assertion that the body of law between the United States and West Germany does not allow the consular questioning procedure embodied in the Circuit Court order. That order, by its very terms, authorizes only such procedures as are allowed by the Notes Ver-

[11]See footnote 10 above.

[12]Appellant's attempts to raise the spectre of awesome international implications are simply unpersuasive. The case law dealing with the Hague Treaty reveals that virtually all of the case law involves VWAG. Presumably other litigations find that questioning of their foreign employees is no substantial inconvenience. And, other signatories to the Hague Treaty have found no cause for alarm in international discovery procedures. One can scarcely resist the conclusion that the Treaty is being invoked by VWAG to avoid the truth-seeking process rather than to resolve any momentous questions of international law.

bales (24a). Thus, the decisive question is whether the Hague Treaty forecloses two signatory nations such as West Germany and the United States from adopting by Notes Verbales procedures more favorable to international evidence-taking than the minimal guarantees of the Treaty.

In more recent years, commercial transactions have become increasingly international in nature. With the multiplication of international transactions came a multiplication in international lawsuits arising out of those transactions. As a result, there arose a need to adopt international procedures sufficient to allow the just disposition of international litigation.

Prior to 1939, the German government had allowed American consular officials to take depositions of American citizens but had not allowed American consular officials to take the depositions of German nationals (61a). In the wake of World War II, international claims between United States and German litigants skyrocketed. See *Uerbersee Finanz-Korporation, Etc* v *Browning,* 121 F Supp 420, 426 (Dist Col, 1954). Accordingly, the American government inquired by Note Verbale of February 11, 1955 whether German law still prohibited consular officers in Germany from taking the depositions of non-Americans (61a-62a).

The German government responded on January 13, 1956:[13]

> "In consideration of the reciprocity granted by the United States, no objections will in future be raised to the questioning of German or other non-American nationals by American consuls in the Federal Republic." (64a).

The 1955 and 1956 Notes Verbales have never been revoked. As provided, the American government has accorded the referenced "reciprocity" (i.e., American nationals can be ques-

[13]The response contained certain assumptions regarding the nature of the questioning. The trial court's order embodies these limitations. It must therefore be assumed that the questioning will be conducted in strict compliance with the Notes Verbales.

tioned by German consular agents in the United States). As a result of the agreement embodied in the Notes Verbales, a workable procedure evolved for litigation involving America and Germany.

Other nations had not been so successful in adopting workable procedures. In response to this problem, the Hague Treaty was developed to provide for minimal guarantees to be afforded in litigation involving the signatory nations. The Hague Treaty (36a-50a) was expressly intended and adopted "to improve mutual judicial cooperation in civil or commercial matters" (36a). A signatory to the Treaty guarantees that it will extend to all other signatory nations the courtesies spelled out in the Treaty.

Among the optional provisions of the Treaty is Article 16. In essence, this Article permits a diplomatic officer or consular agent of one country to take testimony in aid of proceedings commenced in his country, from nationals of the country wherein he exercises his diplomatic functions. This "consular questioning" procedure is available if the foreign nation "has given its permission either generally or in the particular case" or if the foreign nation has declared "that evidence may be taken under this Article without its prior permission" (42a).

When Germany ratified the Treaty, it opted not to include its consent to the general provisions of Chapter II, which includes Article 16. As a result, it was not obliged to allow "consular questioning" by the world at large. However, other provisions of the Treaty permit signatory nations to allow between themselves procedures more liberal than those extended to other countries, Article 27, Article 28, Article 32. Under the Treaty, any difficulties in regard to the Treaty are to be settled through diplomatic channels, Article 36.

Uncertainty arose as to whether the reservations contained in the German ratification of the Treaty affected the preexisting consular questioning privileges extended to the United States. This question was resolved through diplomatic chan-

nels by the exchange of Notes Verbales. On October 17, 1979, the German government stated:

> "With reference to its Note Verbale of November 15, 1978 (512-521.60 USA) concerning legal assistance in civil and commercial matters, the Foreign Office has the honor of informing the Embassy of the United States of America that the agreement between the Foreign Office and the Embassy of the United States of America on the questioning, by consular officers of the United States, of German or other non-American citizens in the Federal Republic of Germany, under the conditions stipulated there, which was concluded by the exchange of notes on February 11, 1955, January 13, 1956, and October 8, 1956, is still considered valid by the German side, as the Hague convention of March 18, 1970, on the taking of evidence abroad in civil or commercial matters, became effective for the Federal Republic of Germany on June 26, 1979."

With this background, it is apparent that the issue raised is insubstantial. The Treaty itself contemplates that interpretive problems are to be resolved through diplomatic channels rather than by the judiciary. Thus, it is far from clear that the Treaty was intended to give rise to a judicial remedy. Nor is it clear that this is the type of "political question" in which the Court may properly become involved. See *Baker* v *Carr*, 369 US 186, 211-212 (1962). Where, as here, the respective nations have agreed through diplomatic channels (American diplomacy being an executive function) on a diplomatic issue, this Court must be most hesitant to impose its views of what diplomacy requires. In short, if both governments are satisfied with allowing reciprocal consular questioning privileges, it is scarcely the province of this Court to tell them not to.[14]

And if judicial review may nonetheless be provident, it can

[14] Were the Court to find it improper for American consular officials to question German nationals for American litigation, the American government would predictably revoke the reciprocal privilege which it has heretofore extended to Germany. See Article 33 of the Treaty, final paragraph (46a).

hardly be said that the Notes misinterpret international law. The Treaty specifically allows signatory nations to adopt the consular questioning procedure, Chapter II, Articles 15-22, 41a-44a. While Germany has declined to extend these privileges to the world at large, nothing in the Treaty prevents it from extending these privileges to the United States. To the contrary, the Treaty establishes only minimal standards of cooperation and encourages individual countries to extend between themselves higher levels of cooperation. Certainly nothing in the letter of the Treaty forecloses the United States and Germany from allowing consular questioning per the Notes Verbales.

Appellant's interpretation of the Treaty would contract the reciprocal rights conferred by the Notes Verbales of 1955 and 1956. Such an interpretation is belied by the very purpose of the Treaty "to *improve* mutual judicial cooperation" (36a).

At minimum, the interpretation placed on the Treaty by the State Department and its German counterpart, the agencies charged with the duty of carrying out its provisions, is entitled to substantial weight. As both have viewed consular questioning as permissible after the Treaty, this Court should defer to that construction.

In sum, Appellant's argument that the consular questioning is prohibited by the Hague Treaty, despite the Notes Verbales, is insubstantial.[15] This is further demonstrated by considera-

[15]In asserting that its argument is substantial, VWAG relies on two California cases, *Volkswagenwerk Aktiengesellschaft v Superior Court Alameda County*, 176 Cal Rptr 874 (1981) (hereinafter "VWAG, 1981" and *Volkswagenwerk Aktiengesellschaft v Superior Court In and For Sacramento County*, 109 Cal Rptr 219 (1973) "VWAG, 1973". Neither case is persuasive.

In VWAG 1973, the plaintiff attempted a "commission" procedure rather than the "consular questioning" procedure involved in this case. It is apparent that VWAG and its counsel failed to inform the Court of the Notes Verbales of 1955 and 1956. A decision which takes no account of the Notes Verbales can hardly influence the instant case where the order in issue is expressly predicated on the procedures permitted by the Notes.

In VWAG, 1981 the Court was plainly in error in concluding that "the Notes Verbales do not qualify the positions of the United States and West

tion of Appellant's related argument that testimony may be obtained only by the Letters Rogatory procedure.

The notion that the testimony of German nationals can be obtained for American litigation only by the Letters Rogatory procedure has been dispelled by VWAG itself. It has obtained in affidavit form the testimony of the proposed deponents without being required to submit Letters Rogatory (see 4b).[16] This vividly dispels Appellant's argument that the testimony of German nationals for American litigation cannot be obtained without the Letters Rogatory procedure.

IV.
THE ORDERS IN ISSUE REST ON ADEQUATE NON-FEDERAL GROUNDS AND ALTERNATIVE RATIONALES WHICH MAKE THIS CASE AN INAPPROPRIATE ONE FOR CERTIORARI.

Appellant suggests that this case presents a simple, single

Germany under the Hague Convention in any relevant respect" (176 Cal Rptr at 883). Moreover, the California Court was apparently troubled by the prospect that the Order in question went beyond the bounds permitted by the Notes Verbales.

In the instant case, the trial judge used the term "depositions", the same term used in the treatises and, indeed, the original American Note Verbale. While there might be some question as to the nature of the procedure allowed by the Circuit Court in this case (due to initial confusion over the status of international law), the specific citation of the Notes Verbales makes it clear that the procedures approved are only those authorized by the Notes.

For present purposes, it must be assumed that the consular questioning will proceed in strict conformity to the Notes. Should the bounds of the Notes be exceeded, judicial intervention might *then* be appropriate. It would be entirely inappropriate for the Court to accept this case on the basis of unfounded speculation that Appellees might at some later date do something inappropriate.

[16]The representative affidavit is included solely for illustrative purposes. The substance of the affidavit — that Mr. Seiffert has never testified at trial on behalf of VWAG and that his duties do not include providing testimony in connection with litigation — is, at best, grossly misleading. In fact, Mr. Seifert provided deposition testimony favorable to VWAG in the California case of *Burney v VWAG*, Los Angeles County Superior Court # 983 505 on June 25, 1979.

issue — whether the Order offends the Hague Treaty or other agreements between the United States and Germany. In fact, this case also presents a number of additional issues which provide alternative rationales for the conclusions reached below.

These grounds may be viewed as adequate non-federal bases for the decisions reached. As such, the correct result was reached, irrespective of how the narrow academic question is decided. Where an independent state ground exists in support of the lower court decisions, this Court will ordinarily not entertain an appeal since its decision on the federal issues cannot affect the result. *City of Mesquite v Aladdin's Castle, Inc,* 455 US 283, 292 (1982); *Zacchini v Scripps-Howard Broadcasting Co,* 433 US 562, 566 (1977). To the extent that the following rationales constitute adequate state grounds for the orders below, the appeal must be dismissed.

In this regard, the state courts have never issued any opinion explaining whether their decision rests on federal or nonfederal grounds. The implication of this posture is explained in Stern & Gressman, Supreme Court Practice (5th ed), p. 234:

> "Where both federal and nonfederal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment, or the opinion is ambiguous, the Supreme Court ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which may be found adequate to support it. This presumption grows out of the principle that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. Where this is not clearly indicated, especially because of the presence of an adequate nonfederal ground, jurisdiction will be declined."

The alternative grounds also demonstrates that the ultimate outcome involves far more than the academic argument posited by Appellant. These alternative grounds suggest that the case

does not involve a "clean" legal issue, a factor which militates strongly against granting certiorari.

A.

VWAG IS ESTOPPED TO PRESENT ITS ARGUMENT

Michigan law recognizes that a party may be estopped to assert a meritorious legal position by its previous silence and admissions. *Kole* v *Lampen*, 191 Mich 156, 157-158 (1916); *Pleger* v *Bouman*, 61 Mich App 558, 561 (1975). In this case VWAG originally raised no objection to the objections and agreed to provide the witnesses (1b-4b). Had Appellant's argument (if meritorious) been asserted in a more timely fashion, the federal issue would have been resolved by now. If necessary, Appellant could have proceeded under the Letters Rogatory procedure. Having by its acquiescence delayed the taking of testimony which Appellant seeks, VWAG is estopped under Michigan law to seek to further delay Plaintiff's day in court by its present arguments.

In addition, VWAG has *itself* presented sworn testimony (by affidavit) of the deponents. Having successfully obtained the testimony of German nationals in a manner not contemplated by the Hague Treaty, Appellant cannot seek to foreclose Appellees from the same procedures VWAG has itself successfully employed in this very lawsuit.

B.

THE HAGUE TREATY IS NOT RETROSPECTIVE IN OPERATION.

At the time this lawsuit was commenced, the procedure in effect was that allowed by the Notes Verbales of 1955 and 1956. The Hague Treaty, on which Appellant relies, was not ratified until June 26, 1979, *after* the commencement of this lawsuit.

Under Michigan law, statutes are deemed to be prospective only and therefore inapplicable to lawsuits pending prior to the enactment. *Mary* v *Lewis*, 399 Mich 410 (1976); *McQueen* v

Great Markwestern Packing Co, 402 Mich 321 (1976). Foreign law is presumed to be the same as Michigan common law. *In re High*, 2 Doug 515 (1847); *Crane* v *Hardy*, 1 Mich 56 (1848). To sustain its argument, it was incumbent upon Appellant to show that the German law of retroactivity is different than that of Michigan. As Appellant failed to do so, Michigan procedure required the Circuit Court to apply German law as Michigan law would be applied — in a non-retroactive fashion that would make it inapplicable to this preceding cause of action.

C.

VWAG, WHICH IS CLOSELY CONNECTED TO THE GERMAN GOVERNMENT, CANNOT STIFLE LEGITIMATE DISCOVERY ON THE BASIS OF GERMAN LAW.

Appellees believe, but cannot conclusively demonstrate, that a substantial portion of VWAG's stock is owned by the West German government.[17] Appellant has never suggested that this belief is inaccurate.

The case law has recognized the principle that a foreign litigant, closely allied with a foreign government, will not be heard to stifle legitimate discovery on the basis of the purported law of the foreign country, as the litigant is in the most advantageous position to request its sovereign to relax any law that would obstruct discovery. See *Petruska* v *Johns-Manville Products Corp*, 83 FRD 53 (1979); *Ghana Supply Commission* v *New England Power Co*, 83 FRD 586 (1979); *Societe Internationale Pour Protections Industrielles* v *Rogers*, 357 US 197, 205 (1958). This alternative rationale also supports the decisions of the state courts.

[17] It is commonly known that VWAG was formed at the behest of Adolph Hitler who, as German Chancellor, commissioned Dr. Porsche to develop a small economical vehicle for the transportation of the German populace. From these seeds sprang the Volkswagen or "people's car". It is the understanding of Appellees that after World War II, VWAG, or a portion of its stock, remained under the control of the government.

D.
VWAG LACKS STANDING TO ASSERT THE RIGHTS OF THE GERMAN GOVERNMENT.

Let us assume, contrary to the preceding argument, that VWAG is not related to the German government. Under that analysis, substantial standing questions arise.

If any principle of standing jurisprudence is well-settled, it is the axiom that a litigant may not assert the rights of strangers to the litigation. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot claim to relief on the legal rights or interests of third parties." *Valley Forge College* v *Americans United for Separation of Church and State*, 454 US 464, 474 (1982).

The rights afforded by the Hague Treaty are rights of the German government. Such rights are to be asserted by the government as an entity, and may not be invoked by one who is simply a citizen. *Valley Forge College, supra* (American citizens, claiming "injury in fact" held not to have standing to assert purported rights of the United States government).

In the instant case, the German government has agreed to the consular questioning procedure through the Notes Verbales. The government has never sought to intervene, and filed nothing in the Circuit Court prior to the only ruling on the merits.[18] Where, as here, the German government has construed

[18] As part of its Appendix (72a), VWAG has included a purported letter sent to the Michigan Supreme Court. Such *ex parte* matters, which are not a part of the record, cannot be considered by this Court. And, if consideration of *ex parte* letters is appropriate, the unsigned letter cannot change the propriety of the Circuit Court's ruling, for *nothing* of the nature was filed in the name of the German government prior to the order of which Appellant seeks review. The position of "sign Hermes", which flatly contradicts the official governmental position expressed in the Notes Verbales, is apparently based on the misapprehension that the Circuit Court Order does not adopt the Notes Verbales. It is a sufficient answer that it must be presumed, at this premature juncture, that the Notes will be scrupulously adhered to. See fn 15, *supra*.

its agreement with the United States as allowing consular questioning, a litigant cannot assert the interests of the German government to the contrary.

E.
A COURT MAY EXERCISE JURISDICTION OVER THOSE WHO VOLUNTARILY APPEAR BEFORE IT.

Virtually all of the proposed affiants submitted affidavits attesting, in essence, that they had appeared voluntarily. These affidavits requested affirmative relief from the trial court in the nature of quashing the testimony scheduled. In addition, two of the proposed deponents have appeared in Michigan, one of them to inspect the vehicle.

Under Michigan law, even where no jurisdiction over the person would otherwise exist, a person who voluntarily appears and seeks affirmative relief has thereby subjected himself to the Court's *in personam* jurisdiction. *Cofrode* v *Circuit Judge*, 79 Mich 332, 338 (1890); *Golden Star Judge #1* v *Watterson*, 158 Mich 696, 699 (1909); *National Coke Co* v *Cincinnati Gas, Coal & Mining Co*, 168 Mich 195, 197 (1911); *Macomb Concrete* v *Wexford Corp*, 37 Mich App 423, 425 (1971).

Appellant has cited nothing which would preclude German nationals from voluntarily participating in American litigation. VWAG has itself successfully enlisted the voluntary participation of its German employees. As the deponents elected to seek relief from the Circuit Court and appeared before the Court for that purpose, they may be subjected to the rulings of the Court, irrespective of what powers the Michigan Courts might have employed absent voluntary appearance.

In short, there are adequate non-federal grounds which support the state court decisions. The appeal must therefore be dismissed.

WHEREFORE, Appellees pray that this Honorable Court

Dismiss or Affirm and that the Court allow Appellees the taxable costs and attorney fees of these appellate proceedings.

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BY: MICHAEL T. MATERNA
RONALD W. SZCZESNY
Attorneys for Plaintiffs
607 Shelby St., Suite 200
Detroit, Michigan 48226
(313) 962-3825

GROMEK, BENDURE & THOMAS

BY: /s/ MARK R. BENDURE
Attorneys of Counsel for
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577 E. Larned, Suite 210
Detroit, Michigan 48226
(313) 961-1525

Dated: June 17, 1983

APPENDIX

I

INDEX TO APPELLEE'S APPENDIX

(Title of Court and Cause)

AFFIDAVIT OF RONALD W. SZCZESNY

STATE OF MICHIGAN)
COUNTY OF WAYNE) ss.

Ronald W. Szczesny, being first duly sworn, deposes and states the following is true to the best of his knowledge, information and belief.

1. That he is an attorney with the law firm of ZEFF AND ZEFF who represent the Plaintiff in this matter.

2. That he has participated in much of the discovery, pleadings and motions of this case.

3. That on April 18, 1980, he participated in an emergency motion to take the Deposition of a Volkswagen Engineer named Frank Achcenich.

4. That on the afternoon of April 18, 1980, he called Mr. Noel Gage and told Mr. Gage that Plaintiff's counsel decided they would not take Mr. Achcenich's Deposition, when Mr. Achcenich was here for the vehicle inspection but would schedule that Deposition and those of other Volkswagen Engineers in Germany at a later date. He further stated to Mr. Gage that it would probably be prior to the latter part of September. Mr. Gage indicated that would be a satisfactory time to schedule such Depositions.

5. That on May 12, 1980, he sent a letter to Mr. Noel Gage reiterating the conversation of April 18, 1980 regarding the imminent scheduling of Depositions in Germany (See Exhibit 1)

6. That in a telephone conversation held on June 17, 1980, Mrs. Schecter indicated that she had applied for her passport and did not have any objections to the Depositions in Germany and in fact looked forward to going to Germany.

7. That on June 25, 1980, he noticed the Depositions of thirteen (13) Volkswagen employees for the week of August 4, 1980. (See Exhibit 2)

8. That on June 26, 1980, he sent another letter to Mrs. Schecter confirming the conversation of June 27, 1980 and again referred to the upcoming August 4, 1980 Depositions in Germany.

9. That in the case of Wieczorek v. Volkswagen, Mr. Noel Gage indicated in a Motion to Adjourn the Trial in that matter, that the Trial, in that matter, could not proceed because of the upcoming Depositions in Germany in the Falzon case which they planned on attending.

10. That on July 17, 1980, at the Deposition of Dr. Nagler, Mr. Gage stated that the Depositions in Germany could not proceed in August since he would be at the American Bar Association Convention in Hawaii, but rather, the Depositions would have to be scheduled for the end of September. Mr. Gage further stated that he could not guarantee the safety of Plaintiff's counsel since Wolfsburg is a company town and its citizens would be very angry toward anyone suing Volkswagen.

11. That the afternoon of July 24, 1980 was the first time that Volkswagen counsel ever indicated any opposition to the Depositions in Germany and was the first time the Hague Convention was ever mentioned.

Further affiant sayeth not.

/s/ Ronald W. Szczesny

RONALD W. SZCZESNY

Subscribed and sworn to before
me this 31st day of July, 1980.
/s/ Deborah DeMan

Deborah DeMan, Notary Public
Macomb County, Michigan
Acting in Wayne County
My Commission Expires: 2-5-83

ZEFF AND ZEFF
Attorneys and Counselors at Law
30th Floor Guardian Building
Detroit, Michigan 48226

May 12, 1980

Noel Gage, Esq.
3000 Town Center
Ste. 1500
Southfield, Michigan 48075

Re: Falzon v. Volkswagen

Dear Mr. Gage:

Pursuant to our conversation on April 18, 1980, I look forward to having dinner with you on the Rhine. As I had indicated I don't think I can stall it until the Oktoberfest. I will be contacting you shortly to arrange some mutually convenient dates for Depositions.

As I suggested, make your passport arrangements now as I already have mine.

Auf Wiedersehn,

Ronald W. Szczesny

RWS/lc

ZEFF AND ZEFF
Attorneys and Counselors at Law
607 Shelby Street
Suite 200
Detroit, Michigan 48226

June 26, 1980

Lynn Shecter
3000 Town Center, Ste. 150
Southfield, Michigan 48075

Re: Falzon v VWAG

Dear Ms. Shecter:

This letter is to confirm our agreement by telephone of June 17, 1980, wherein I indicated and you agreed that if you did not express any opposition by June 20, 1980, I would notice the depositions of several VWAG employees in Wolfsburg, Germany to proceed the week of August 4, 1980 and continue to completion.

I assume you will have received the deposition notice by the time you receive this letter and have no objections.

See you in Germany.

Very truly yours,

Ronald W. Szczesny

RWS:sy

(Title of Court and Cause)

AFFIDAVIT

ULRICH SEIFFERT, being duly sworn, deposes and says:

1. I am a citizen and a resident of the Federal Republic of Germany and I am head of research for Volkswagenwerk AG.

2. I was not responsible for the design, development, testing, manufacture or assembly of the 1973 Volkswagen Type II vehicle.

3. I do not have any familiarity with the details of the above-captioned matter nor have I been consulted with respect to any of the allegations which have been raised therein and I do not intend to appear as an expert on behalf of Volkswagenwerk AG at the time of the trial of this matter even if requested.

4. I have never testified at trial as an expert witness on behalf of Volkswagenwerk AG either with respect to Volkswagen vehicles in general or in litigation involving "rollover characteristics" or any "door latch systems" or concerning "side wind performance."

5. In view of my lack of familiarity with this matter, as well as my personal commitments and professional responsibilities, the giving of testimony or information in conjunction with this matter would be disruptive to my personal schedule and would interfere with my business responsibilities.

6. My duties do not include assisting counsel or providing testimony in connection with litigation. Thus, if received, I would respectfully decline a request by my employer or an invitation from others to provide information or give testimony herein.

7. I have never been known by the name of "Wrich Siefert" and am not acquainted with such an individual.

/s/ ULRICH SEIFFERT
Ulrich Seiffert

Sworn to before me this
22nd day of October, 1980

Notar

Urkundenrolle Nummer 247/1980

Herrn Dr. Ulrich Seiffert, 3300 Braunschweig, Jahnskamp 22 wurde auf Verlangen diese Urschrift ausgehandgt.

Braunschweig, den 22.October1980

Notar

28 USC §1257

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, trealties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or states of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

RULE 304 Persons Before Whom Depositions May Be Taken.

.1 Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken (1) before a

person authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held, or (2) before such person as may be appointed by the court in which the action is pending, or (3) before any person upon whom the parties agree by stipulation in writing or on the record. A person so appointed or agreed to shall have the power to administer oaths, take testimony, and do all other acts necessary to take an effective deposition.

.2 In Foreign Countries. In a foreign state or country depositions shall be taken (1) before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person as may be appointed by commission or under letters rogatory, or (3) before any person upon whom the parties agree by stipulation in writing or on the record. Such persons have the power to administer oaths, take testimony, and do all other acts necessary to take an effective deposition. A commission or letters rogatory shall be issued only when necessary or convenient, on application or notice, and on such terms and with such directions as are just and appropriate. Persons may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

.3 Disqualifications for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action unless the parties agree by stipulation in writing or on the record to the contrary.

RULE 518 Judgments.

.1 Decree. "Judgment" as used in these rules shall include a decree as heretofore known.

.2 Judgment Upon Mutiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in action whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

.3 Demand for Judgment. A judgment be default shall not be different in kind from, or exceed in amount, that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

.4 Exceptions Unnecessary. No exception need by taken to any judgment.

[Amended March 1, 1964.]

RULE 806 Appeals by Right and by Leave.

.1 Appeal as of Right. In all criminal and civil matters, an aggrieved party shall have a right to appeal from all final judgments or final orders from the Circuit Courts, Court of Claims and Recorder's Court, except judgments on ordinance violations in the Traffic and Ordinance Division of Recorder's Court. Appeals from final judgments from all other courts and

from convictions for ordinance violations in the Traffic and Ordinance Division of the Recorder's Court shall be taken to the Circuit Courts, upon which further review may be had only upon application for leave to appeal granted by the Court of Appeals. Final judgments or interlocutory orders of courts which by law are appealable to the Circuit Court only upon leave or on appeal are to be tried do novo in the Circuit Court shall continue to be tried in the Circuit Court. Se sub-rule 701.1. Appeals from final or interlocutory judgments of the District Court, Common Pleas Court, or judgments in ordinance cases in the Traffic and Ordinance Division of Recorder's Court shall be taken to the Circuit Court in which such court is located. Appeals as of right shall be taken in accordance with and within the time prescribed by these rules.

.2 Appeal by Leave. The Court of Appeals may grant leave to appeal from:

(1) Final or interlocutory judgments or orders of administrative agencies or tribunals which by law are appealable to the Court of Appeals or the Supreme Court.

(2) Any judgment, order, act or failure to act by the Circuit Courts, Court of Claims, and Recorder's Court, except on ordinance violations in the Traffic and Ordinance Division of Recorder's Court, which is not a final judgment appealable as of right.

(3) Orders in domestic relations cases for temporary alimony, payment of expenses, or support or custody of minors entered prior to final judgment shall be deemed interlocutory in nature and appealable only by leave.

(4) Final judgments entered by the circuit court on appeals from any other courts.

(5) Such other matters as are provided by the rules of the Supreme Court or other laws.

If an application (under either subrule 806.4[1] or [2]) in a

civil case is filed more than 18 months after entry of the order or judgment appealed from, leave to appeal may not be granted.

.3 Procedure for Leave to Appeal. To obtain leave to appeal to the Court of Appeals, appellant shall within the time limited for taking an appeal as of right, except when delayed appeal is sought:

(1) Prepare an application for leave to appeal as follows:

(a) The application shall set forth the reasons and grounds for granting leave to appeal. The court will pay particular attention to the following reasons and grounds:

(i) Where appeal as of right is not expressly allowed by statute or rule from a final judgment or order. The showing of any condition for appeal required by statute or rule and that the matter asserted is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous.

(ii) In all interlocutory matters. That the trial judge has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, or if it is shown by the appellant that the matter is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous and appellant would suffer substantial harm by awaiting final judgment before taking appeal.

(b) The application shall have attached to it a proposed concise statement of the proceedings and facts as far as they are material. In all cases where error is alleged in the charge of the court, the whole of the charge shall be set up in the statement. It shall also contain the calendar entries to date, the date of entry and a copy of the judgment or order appealed from, and the opinion or findings of the court, if on file, or dictated to the court reporter.

(c) If defendant desires bail pending appeal in criminal cases, the application shall state the amount of bail set by the trial court pending application for leave to appeal, if any was set.

(2) Serve a copy of the application and proposed concise statement on all other parties whether joint or adverse, with notice of prompt settlement of the statement before the trial judge or any other judge having authority to perform necessary acts in the review process. See sub-rule 812.9.

The trial court may after a hearing, on a motion filed and served within 20 days from the entry of an order appealed from, extend the time for taking the above steps for a period not exceeding 30 days. The Court of Appeals may grant further time on motion filed within such extended period.

(3) Objections to the concise statement shall be settled promptly by the judge, and, when satisfied, he shall certify that it fairly presents the questions for review.

(a) A transcript of the testimony shall not be required as a basis for the settlement. The judge settling such statement may correct it or add matters of record which he may deem necessary to present the issue properly. When a discretionary action of the court is to be reviewed, the judge may add to the statement his reasons for such action.

(b) In case either party objects to the statement by the judge, he may file in the Court of Appeals affidavits, copies of pleadings, exhibits or a transcript of the relevant testimony relating to the question for review and a copy thereof shall promptly be served on the other side.

(4) Within 10 days after the statement is settled and certified, appellant shall file 4 duplicate typewritten or printed copies of the application and certified statement along with 4 copies of documents filed by him pursuant to subsection (3) (b) hereof with the clerk of the Court of Appeals and notice it for hearing as a motion accompanied by 4 duplicate typewritten or printed copies of a brief in support thereof.

At least one of such copies shall be signed as provided in Rule 114. The day of the hearing shall not be earlier than 20 days after the notice except by agreement of counsel or order of the Court of Appeals.

(5) With service of notice of hearing, appellant shall serve on all other parties a copy of the documents filed under subdivision (4) hereof and make proof of service thereof. Any party may file a brief in opposition to the application, provided such brief is filed at least 5 days prior to the date of application is noticed for hearing. Four duplicate typewritten or printed copies of briefs and documents filed by appellee pursuant to subsection (3) (b) hereof shall be filed with the clerk of the Court of Appeals and a copy thereof shall be served on the opposite side.

(6) All briefs filed in support of, or in opposition to, applications for leave to appeal shall conform to the requirements of Rules 813 and 814.

.4 Delayed Appeal.

(1 In cases where timely appeal requires leave, application for delayed appeal shall be made as above provided, and, in addition, shall affirmatively show, by affidavit of facts, that the delay was not due to appellant's culpable negligence. Any party may file affidavits in opposition thereto.

(2) Where timely appeal would have been of right, application for delayed appeal need not be accompanied by settled statement of facts but shall affirmatively show, by statement of facts and brief, that there is merit in the claim of appeal and, by affidavit of facts, that the delay was not due to appellant's culpable negligence. The application shall be noticed for hearing as a motion. Any other party may file opposing statement, brief and affidavits.

Briefs filed in support of, or in opposition to, applications for delayed appeal shall conform to the requirements of Rules 813 and 814.

.5 Emergency Appeal. On showing of emergency, of appel-

lant's due diligence, and of the character of injury to him through observance of the above practice on application for leave to appeal, application may be made on ex parte statement of fact, showing of merit, and on proof of such notice to other parties as the circumstances permit, or excuse for lack of notice, an immediate consideration of the application may be prayed.

.6 Appeals from Administrative Bodies and Officers.

(1) To obtain leave to appeal to the Court of Appeals from an order, award, or action of any administrative board, officer, or tribunal, the appellant shall, except in cases of delayed appeal, within 20 days after the entry of the order, award, or action sought to be appealed, or within 30 days in appeals from Workmen's Compensation cases:

(a) File in the Court of Appeals 4 duplicate copies of an application for leave to appeal, setting out the reasons and grounds of appeal, accompanied by the original record certified as correct by the officer having custody thereof, with 4 duplicate copies of supporting brief; provided, however, if appellant has ordered such certified record from the officer having custody thereof and it has not yet been delivered, such record shall be filed within 10 days after delivery thereof to appellant.

(i) The certified record shall include all documents, files, pleadings, testimony, opinions of the board or officer, except such as may be summarized or omitted in whole or in part by stipulation of parties. Any testimony not then transcribed shall be filed as promptly thereafter as possible.

(ii) The certified record shall be separate from the application for leave to appeal and the original record shall be returned by the clerk to the board or department from which it originated after the final determination of such appeal, or denial of the application for leave to appeal.

(b) Notice the application for hearing as a motion in the Court of Appeals and serve copies of the application, record,

and briefs, on all other parties or their counsel, at least 20 days before the date of hearing or such shorter period as shall be stipulated by counsel or as ordered by the Court of Appeals.

(2) In proper cases, sub-rules 806.4 and 806.5 shall be applicable under this sub-rule 806.6.

(3) Upon the determination of such application by the Court of Appeals, the clerk shall enter an order in accordance therewith and mail copies to counsel for the parties. If the application is denied, the court may tax costs as on motion.

.7 Peremptory Order. Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order.

.8 Costs on Denial of Leave. If leave to appeal is denied, costs shall be taxed as on motion unless otherwise indicated by the Court.

[Amended Jan. 1, 1965; July 13, 1965; March 1, 1967; Dec. 5, 1968; Feb. 13, 1969; June 1, 1973; June 10, 1975; June 2, 1978.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,
Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON,
RODNEY FALZON and RAMON FALZON, minors
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANT'S REPLY BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Michael Hoenig
Ian Ceresney
C. Thomas Schweizer

THE INLAND PRESS, DETROIT, MICHIGAN

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III. MICHIGAN LAW AND AUTHORITIES

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INTRODUCTION

This Reply Brief is filed pursuant to Rule 16.5 of the Rules of the Supreme Court of the United States. No attempt will be made to address each of the arguments made by Appellees in their Brief in Support of a Motion to Affirm or Dismiss. Rather, the purpose of this Reply is to clarify and re-assert Appellant's arguments as to those issues which Appellant respectfully submits are the key issues to be considered in determining whether or not this Court, by appeal or certiorari, should

take jurisdiction of the constitutional and treaty issue questions raised by Appellant. To the end of speaking to the questions presented in the matter at bar — those issues generated by the rulings of the Michigan Courts rather than those conceived by Appellees — a review of the relevant Michigan proceedings is necessary.

On March 4, 1982, the Michigan Trial Judge filed, pursuant to Michigan General Court Rule 806.3, a Certified Concise Statement of Facts and Proceedings (Appendix 8a-23a). Rule 806.3(1)(a)(ii) reads in pertinent part:

> (ii) In all interlocutory matters. That the trial judge has certified that *the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, or if it is shown by the appellant that the matter is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous and appellant would suffer substantial harm by awaiting final judgment before taking appeal.* (Emphasis added).

Among the questions certified for immediate appeal were (Appendix 22a):

> 1. Whether a Michigan Circuit Court Judge that has undisputed jurisdiction over the parties and subject matter can order defendant's (VWAG) employees or its former employees to submit to depositions in Germany, under oath and in accordance with Michigan Practice and Procedure (GCR 304.2) and Notes Verbales of 1955?
>
> 2. And whether or not the taking of such discovery depositions would violate the Hague Treaty (28 USC §1781), or is obtaining of such information and disclosures confined to Letters Rogatory?

Upon appeal, the Michigan Court of Appeals affirmatively refused to act (Appendix 3a). On February 22, 1983, the Michigan Supreme Court also refused to consider the questions raised under the Treaty between the United States and The

Federal Republic of Germany (Appendix 2a). Thereafter the Trial Judge, recognizing "the Michigan Supreme Court's decision to dispose of the case by refusing to grant leave to appeal," denied Appellant's Motion for Stay of Depositions of "eleven (11) German nationals" (Appendix 6a-7a).

> NOW, THEREFORE, IT IS ORDERED that the Motion for Stay filed by Defendant VOLKSWAGEN AKTIENGESELLSCHAFT with regard to the March 28, 1983, notice scheduling the depositions of eleven (11) German nationals to begin in the Federal Republic of Germany on May 2, 1983, all pursuant to this Court's earlier Orders of October 7, 1980 and August 17, 1982 be and the same is hereby denied.
>
> CHARLES S. FARMER
> Circuit Court Judge

The seminal Order of October 7, 1980, (Appendix 24a-25a), which still controls the parties at the trial level, says: (emphasis not in original)

> *IT IS HEREBY ORDERED that in view of this Court's desire for the Michigan General Court Rules control of these proceedings as much as possible,* that the plaintiffs schedule the *depositions of the following individuals,* represented by plaintiffs to be employees *in Germany* of defendant VWAG, at a time mutually convenient for both plaintiffs' and defendant's counsel:
>
> * * * *
>
> *IT IS FURTHER ORDERED* that *deponents shall answer all questions promulgated,* and that counsel for the defendants shall have the right to place objections to said questions on the record, that *the transcript shall be placed under seal and filed pending resolution of all such objections by the Court,* that only counsel for the parties shall view *said transcript* pending such resolution, that the contents of *said depositions* and of said *transcript* shall remain confidential to only counsel for the parties;
>
> * * * *
>
> *IT IS FURTHER ORDERED that this issue is of major significance to the jurisprudence of this state and*

raises a serious question involving a conflict between the law of this state and of the United States, that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of the litigation, and that defendant VWAG may suffer substantial harm by awaiting final judgment before taking appeal.

/s/ _____
CHARLES S. FARMER
Circuit Judge

The following emphasized portions of the August 17, 1982, Order (Appendix 7a-8a) are equally instructive as to the insistence of the Michigan Courts of the primacy of Michigan Court Rules — even in Germany. (But for the Stay Orders of Chief Justice Burger and Justice O'Connor this August 17th Order would, as well, be in full force and effect as a final order).

Aug. 17, 1982
ORDER REQUIRING DISCOVERY

Upon the plaintiffs' motion for default, and the defendant having responded, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED that defendant Volkswagen A.G. *produce for depositions in Wolfsburg, Germany,* all employees as identified in this Court's order of October 7, 1980, *for deposition* on or before August 30, 1982, at a location to be mutually agreed upon *in Wolfsburg, Germany.*

IT IS FURTHER ORDERED that unless this order is complied with, or unless this order is stayed or otherwise modified, *failure to produce said employees* by August 30, 1982, date shall subject defendant Volkswagen A.G. to appropriate sanctions as will be determined by this Court.

Nowhere in any order of the Michigan Courts is any reference made to "consular questioning" (first suggested by Appellees in their Brief filed with this Court) or other proceedings remotely resembling those mandated by the Treaty. *Every-*

where, the procedures ordered to be followed by American attorneys in Germany reference "depositions," "produce for deposition," "failure to produce for depositions," "deponents shall answer," "transcript," and "objections." The most cursory reading of the Hague Convention (Appendix 34a-52a) and, indeed, of The Notes Verbales (Appendix 61a-71a) as well as the statement of the German Ambassador (Appendix 72a-74a) leave no question but that the Order of the Michigan Courts is an anathema to the Treaty and to the obligations to which the United States is constitutionally bound.

I.

THE REFUSAL OF THE MICHIGAN SUPREME COURT TO REVERSE THE ORDER OF THE MICHIGAN TRIAL COURT ORDERING DEPOSITIONS TO BE TAKEN IN GERMANY IN VIOLATION OF TREATY RIGHTS AND OBLIGATIONS IS A FINAL ORDER.

In their Brief in Support of their Motion to Dismiss or Affirm, Appellees argue that the Orders of the Michigan Trial and Appellate Courts do not have sufficient indicia of finality under *Cox Broadcasting Corp.* v *Cohn*, 420 US 469 (1975) and *Cohen* v *Beneficial Industrial Loan Corp.*, 337 US 541 (1949) since these Orders are mere Discovery Orders which may prove to have little consequence to the final judgment and, in any event, are still subject to further review and refinement in the Trial Court. The record, however, demonstrates that Appellees are, at best, being disingenuous in their characterization of the Orders.

First, the Trial Court, as indicated above, has certified that this Appeal involves a controlling issue of law "of major significance" and that it should be decided in advance of and apart from the state law issues in the case (Appendix 25a).

Second, by certifying the question, the Trial Court Judge has already indicated that his Order will not be revisited or revised in the course of further trial court proceedings. In

simple terms, it is the final decision of the Trial Court on the German depositions.

Third, as indicated by the "Order Requiring Discovery" of August 17, 1982, (App. 7a) should Appellant not produce employees or former employees for deposition, the Trial Court will impose sanctions. This Order clearly indicates that there is no additional clarification or refinement to be explored in the Trial Court.

Fourth, as indicated by the "Order Denying Defendant's Motion to Stay the Taking of Certain Depositions" dated April 15, 1983, all appellate avenues have been exhausted and absent relief in the United States Supreme Court, the Trial Court is requiring that the depositions be taken as originally ordered.

When this Court took jurisdiction in *Cox Broadcasting Corp.* v *Cohn*, 420 US 469 (1975) the matter had not come to trial. Nevertheless, this Court held that the Georgia ruling was final under 28 USC §1257(2) and said at 420 US 485:

> Delaying final decision of the First Amendment claim until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment," "an uneasy and unsettled posture [that] could only further harm the operation of a free press."

In this case the obligations of the United States under a treaty are about to be breached by virtue of an order of a Michigan trial court judge and the refusal of the Michigan Supreme Court to reverse that order. If that order is not reviewed, this Court will "leave unanswered" an important question of constitutional and international law and will further leave the question of how the United States adheres to its treaty obligations in this area in an "uneasy and unsettled posture". Even more compelling considerations than those which prompted this Court to take jurisdiction in *Cox, supra*, are present here.

Similarly, under the "collateral order" exception to finality (as developed with respect to 28 USC §1291) discussed by Appellees at Page 11 of their brief, the treaty issue raised by

Appellant meets the test for immediate review as reiterated in *Cohen* v *Beneficial Industrial Loan Corp.*, 337 US 541, 546 (1949): ". . .too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The product liability action under state law currently pending between the parties in this matter is so totally divorced from the constitutional, international law and treaty questions raised by the subject discovery orders as to make it inappropriate to link the resolution of both questions in one proceeding or to force a delay in the resolution of the treaty issue until such time that a trial is completed on the separate product liability matter. Further, since a genuine question of violating another nation's sovereignty is present, this matter rises to a level where more than delay of a litigant's rights are involved. If the depositions are allowed to go forward, and if it is later determined by this Court, or the United States State Department, or the Foreign Office of the Federal Republic of Germany, that treaty rights and obligations have been breached there will be a *fait accompli* that cannot be rectified by later judicial review.

II.
THIS MATTER IS PROPERLY BEFORE THIS COURT AS AN APPEAL, BUT IF NOT, THE QUESTION PRESENTED IS SO SUBSTANTIAL THAT IT SHOULD BE REVIEWED BY CERTIORARI.

Appellant has denominated this petition for review by this Court as an appeal on the strength of the holdings of this Court in *Japan Lines Ltd.* v *County of Los Angeles*, 441 US 434 (1979) and *Cohen* v *California*, 403 US 15 (1971).

In this case, the Michigan General Court Rules governing depositions were squarely challenged on the grounds that, *as applied*, they abrogated a treaty. The trial court judge in his Certified Concise Statement of Facts and Proceedings (Ap-

pendix 8a-22a) characterized Appellant's challenge to his order as follows(Appendix 13a):

> That the procedure advocated by plaintiffs-appellees was in direct contravention of the Hague Convention on Taking Evidence Abroad; the codification of that Treaty in 28 USC §1781; the United States Constitution Article VI, Section 2 . . .

Further, the trial judge stated particular questions for review as set forth in the Introduction, *supra* at 2.

It is clear that the court rules, as applied, were challenged on constitutional and treaty grounds. It is likewise established that with respect to the language of 28 USC §1257(2) state court rules are deemed to be "statutes". *In Re Griffiths,* 413 US 717 (1973).

In any event, this Court, pursuant to 28 USC §2103, may treat the Jurisdictional Statement as a petition for a Writ of Certiorari. Appellant at Page 18 Note 9 of the Jurisdictional Statement has requested such relief, if the Court deems it appropriate; that request is again herein renewed.

III.

THE NOTES VERBALES DO NOT PROVIDE A PROCEDURE FOR TAKING DEPOSITIONS IN CONTRAVENTION OF THE HAGUE CONVENTION.

Appellees suggest that the Notes Verbales provide an alternate acceptable method for the taking of depositions apart from the Hague Convention. Such is simply not the case. (The argument also overreaches the appropriate limits to a brief at this stage since the positions advanced go to the merits of the dispute, and, in so doing, demonstrate the need for further briefing and a full hearing on the merits.)

The plain language of the Notes Verbales indicate (Appendix 70a):

> (1) that no compulsion is brought to bear on the person to be questioned to make him appear or provide information, more specifically,
>
> (a) that the request to provide information is not

called a "summons" and that the questioning is not called "interrogation";

(b) that no coercive measures are threatened in the event that a person does not appear or refuses to provide information;

(c) that no compulsion whatsoever is brought to bear on a person ready to provide information to make him sign protocols or other records of orally provided information.

The above-described procedure is certainly not a deposition. It is also clear from the Notes that American consuls in the Federal Republic, and not American lawyers are the persons who are authorized to do the questioning (Appendix 64a).

When read in context with the Hague Treaty reservations by the Federal Republic of Germany in which the Federal Republic states that "taking of evidence by diplomatic officers and consular agents is not permissible in its territory if Germany nationals are involved" (Appendix 50a), it is apparent that the questioning authorized by the Notes Verbales is not a formal "taking of evidence" or a deposition.

The position of the German government as set forth by its Ambassador in the letter quoted in the Jurisdictional Statement (Appendix 72a-74a) is also instructive as to the German government's view of the Notes Verbales. Appellees cannot dismiss this letter as easily as they would like. It was accepted for filing by the Michigan Supreme Court and is properly a part of this record. Even if it were not a part of the record, this Court could take judicial notice of it pursuant to Rule 44.1 of the Federal Rules of Civil Procedure. Similarly, under Michigan law, it could be judicially noticed under Rule 202 of the Michigan Rules of Evidence.

Finally, Appellant would note that Appellees cannot avoid the contradiction inherent in the trial court's order. If the Notes Verbales are to control, then no compulsion may be issued and no sanctions can be imposed either directly or indirectly to compel attendance or require responses to question-

ing. If this is the reading which Appellees would adopt (which, assuredly, they do not) then no depositions will be taken and the order is meaningless. On the other hand if Appellant will be subject to sanctions for failure of its employees to appear — as indicated by the trial court to be the case in its order of August 17, 1982 (Appendix 7a) — then the purely voluntary procedures of the Notes Verbales are inapplicable. Case authority further establishes that when compulsion of any kind is used, whether direct or indirect, to gather evidence abroad, the Hague Treaty procedure is the only acceptable procedure. *FTC* v *Compagnie De Saint- Gobain-Pont-A-Mousson*, 636 F2d 1300 (D.C. Cir. 1980).

RELIEF

For the reasons stated above and in the previously filed Jurisdictional Statement, Appellant requests that this Court note probable jurisdiction.

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No. 82-1888

In the Supreme Court of the United States

OCTOBER TERM, 1983

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
APPELLANT

v.

JOSEPH FALZON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether orders of a Michigan trial court directing that depositions be taken of German nationals in the Federal Republic of Germany are contrary to bilateral and multilateral agreements between the United States and the Federal Republic of Germany.

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

In this products liability suit, a Michigan trial court has entered two orders directing that depositions be taken of German nationals in the Federal Republic of Germany (hereinafter FRG). The question on this appeal is whether such orders are valid under a bilateral exchange of notes between the United States and the FRG, T.I.A.S. No. 9938 (February 11, 1955; January 13, 1956; October 8, 1956; October 17, 1979; February 1, 1980) (hereinafter Exchange of Notes), set forth at J.S. App. 61a-71a, or

under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, opened for signature March 18, 1970, entered into force between the United States and the FRG on June 26, 1979 (hereinafter Evidence Convention), set forth at J.S. App. 34a-52a.

On June 3, 1977, appellees filed an action for damages in Michigan Circuit Court against appellant and others for personal injuries sustained in an accident on October 27, 1974, while appellees were riding in a microbus designed and manufactured by appellant (J.S. App. 8a-9a). In June 1980, appellees noticed the depositions in Germany of a number of appellant's employees pursuant to Rule 306 of the Michigan General Court Rules (GCR) (J.S. App. 9a, 12a). Appellant moved to quash the depositions on the grounds, inter alia, that the procedure proposed by appellees was contrary to the Evidence Convention, to United States constitutional and statutory provisions, to German law and to the GCR (*id.* at 10a, 13a-14a).

In an order entered October 7, 1980, the trial court directed that the depositions be scheduled but that the Exchange of Notes "will control the course of the taking of these depositions" (J.S. App. 24a). (The Exchange of Notes provides for the taking of testimony only by United States consular officers (*id.* at 61a-66a).) The trial court's order required that the "deponents shall answer all questions promulgated," that counsel could raise objections to questions, and that the transcript would be placed under seal so that objections could subsequently be resolved by the court (*id.* at 24a). The order also provided that appellees would pay their own costs "should [appellees] be unable to take said depositions because of the operation

of German law or because of the opposition of the Federal Republic of Germany" (*id.* at 25a). The trial court certified its order for interlocutory appeal, but, on May 27, 1982, the Michigan Court of Appeals denied appellant's applications for leave to appeal "for failure to persuade the Court of the need for immediate appellate review" (*id.* at 3a).

Subsequently, on August 17, 1982, the trial court ordered appellant to "produce for depositions in Wolfsburg, Germany, all employees" named in the earlier order for deposition (J.S. App. 7a). This second order provided that failure by appellant to produce the employees "shall subject [appellant] to appropriate sanctions as will be determined by this Court") (*ibid.*). On February 22, 1983, the Michigan Supreme Court denied appellant's application for leave to appeal "because the Court is not persuaded that the questions presented should be reviewed by this Court" (*id.* at 2a).

DISCUSSION

The orders of the Michigan trial court conflict with the obligations of the United States under the Evidence Convention, are not authorized by the Exchange of Notes, and therefore are invalid under the Supremacy Clause (U.S. Const. Art. VI, Cl. 2). See *United States* v. *Pink*, 315 U.S. 203, 230-231 (1942). Because the State Department will instruct United States consular officers in the FRG not to conduct the ordered depositions, however, no international law violation will result at this stage of the litigation. Accordingly, review by this Court is not warranted at the present time.[1]

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[1] We note that this Court appears to lack jurisdiction over this case except by way of certiorari under 28 U.S.C. 1257(3),

1. The Evidence Convention was fashioned after the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, entered into force for the United States, February 10, 1969 (hereinafter Service Convention), which comprehensively regulates the procedures for effective transnational service among member states. The United States played a dominant role in the negotiation of both the Service and Evidence Conventions, and encouraged foreign states to join both, largely on the strength of representations concerning substantial reforms in United States law and procedures that came about as a result of changes in 1963 to the Federal Rules of Civil Procedure (Fed.

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as requested in the alternative by appellant pursuant to 28 U.S.C. 2103 (see J.S. 18). Appellate jurisdiction under 28 U.S.C. 1257(1) clearly is not appropriate here, because the state courts have issued no decision in this case against the validity of a treaty. Similarly, jurisdiction by way of appeal under 28 U.S.C. 1257(2) also is unavailable. The record, as reflected in the papers filed in this Court, does not reveal that appellant explicitly challenged the validity of the Michigan Court Rules as applied, but rather shows that appellant attacked the particular actions of the trial court as invalid on federal grounds. There is therefore no jurisdiction under 28 U.S.C. 1257(2). See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (plurality opinion); *Hanson* v. *Denckla*, 357 U.S. 235, 244 & n.4 (1958); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-187 (1945). This case, like virtually every case, involves court actions taken pursuant to court rules. No distinctions in the court rules themselves are challenged, as in *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), and *In re Griffiths*, 413 U.S. 717, 718 (1973), and no assertedly unconstitutional application of a substantive state statute is involved, as in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-441 (1979), and *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971).

R. Civ. P. 4(i) and 28(b)) and amendments in 1964 to the Judicial Code (28 U.S.C. 1696, 1781 and 1782). United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures. See *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 287-289 (3d Cir. 1981); *Richardson* v. *Volkswagenwerk, A.G.*, 552 F.Supp. 73, 78-79 (W.D. Mo. 1982); *Porsche, A.G.* v. *Superior Court*, 123 Cal. App. 3d 755, 760-762, 177 Cal. Rptr. 155, 157-159 (1981); *Low* v. *Bayerische Motoren Werke*, 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 735 (1982); *Kadota* v. *Hosogai*, 125 Ariz. 131, 134-138, 608 P.2d 68, 71-75 (Ct. App. 1980); *Cintron* v. *W & D Machinery Co.*, 182 N.J. Super. 126, 135, 440 A.2d 76, 81-82 (1981).

Similarly, the Evidence Convention deals comprehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence. Most civil law countries provide much less freedom in the collection of evidence for use in foreign proceedings than do the United States and other common law countries. See Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L. Q. 646, 647 (1969). This is because civil law countries regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation or consent of officials of the host country, the "judicial sovereignty" of the host country is considered to have been violated. See *ibid.*; *Report of United States Delegation to Eleventh Session of the Hague Conference on Private International Law*, 8

Int'l Legal Materials 785, 804, 806 (1969). Efforts to accommodate these differences resulted in the Evidence Convention, which provides substantial benefits to United States litigants. For instance, unlike the situation prior to the Convention, United States litigants can now be assured of compulsory attendance of witnesses abroad (Art. 10), and testimony under oath and verbatim recording are now available (Art. 9). See Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 Int'l Law. 465, 473-474 (1983). The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it. Appellees do not appear to argue to the contrary.

The Evidence Convention provides for three alternative methods of conducting evidence taking proceedings abroad in connection with civil or commercial litigation in United States courts: (1) a letter rogatory (called in the English text of the Convention a "letter of request") transmitted through a foreign "Central Authority" to a foreign court, which conducts the proceeding (Arts. 1-14); (2) notice to appear before an American diplomat or consular officer (Arts. 15-16); and (3) designation of a private commissioner to take evidence (Art. 17). The three methods correspond to those provided for by Fed. R. Civ. P. 28(b). See generally Note, *Taking Evidence Outside of the United States*, 55 B. U. L. Rev. 368 (1975). The second and third methods, which do not

involve proceedings before a judicial authority of the host country, are subject to strict limitations in the Evidence Convention. In particular, a party to the Convention is expressly permitted to reserve the right not to allow the taking of evidence before a consular officer or diplomat, or before a private commissioner (Art. 33, 35). The FRG made such a reservation, stating "that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved" (J.S. App. 50a). Thus, in the absence of an additional international agreement (see Art. 28(g), Art. 32), the Evidence Convention precludes proceedings to take evidence from German nationals in the FRG in aid of United States litigation, with the exception of the letter of request procedure.[2] The instant orders requiring depositions before a United States consular officer are therefore barred by the Evidence Convention unless authorized by the Exchange of Notes.[3]

2. a. The Exchange of Notes occurred in 1955 and 1956. Following World War II, the United States and other occupying powers took evidence in occupied

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[2] Evidence may also be taken from German nationals by private commissioners, but only on express prior approval of the relevant FRG Central Authority (Art. 17; FRG Instrument of Ratification, ¶ B(4), set forth at J.S. App. 52a). See Shemanski, *supra*, 17 Int'l Law. at 479.

[3] The fact that a state court has personal jurisdiction over a private party (see Motion to Dismiss or Affirm 23) does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction.

Germany on their own terms.[4] With the termination of the Occupation Regime in the FRG in 1955, however, control over foreign evidence gathering on German territory became a matter within the exclusive control of German authorities and German law. Because the United States desired to retain the exceptional privilege of taking evidence from German and third-country nationals on German soil, the Office of the United States High Commissioner for Germany initiated an exchange of notes with the German Federal Ministry of Foreign Affairs on February 11, 1955 (J.S. App. 61a-66a). See generally Shemanski, *supra*, 17 Int'l Law. at 477-478; *Volkswagenwerk, A.G.* v. *Superior Court*, 123 Cal. App. 3d 840, 854-855, 176 Cal. Rptr. 874, 882-883 (1981). The initial note stated, inter alia, that, "[i]n the absence of a current German law prohibiting it or a specific request from the German authorities that such testimony not be taken, American consular officers in Germany will continue as they have since the war to take the voluntary depositions of all nationalities" (J.S. App. 61a).

In its reply note of January 13, 1956 (J.S. App. 62a-63a, 64a-65a), the German Ministry of Foreign Affairs accepted the High Commissioner's proposal and agreed that no objection would be raised to the questioning of German or other non-American nationals by United States consular officers in the Federal Republic, on the following conditions (*id.* at 64a):

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[4] The occupying powers gathered evidence freely from German and third-country nationals in connection with such matters as war crimes investigations, restitution cases, the location of missing persons, and other similar endeavors related to the war.

1) No compulsion of any kind will be used to force the person to be questioned either to appear or to make statements; specifically,

(a) the request to give information will not be called a "summons," and the questioning will not be called an "interrogation";

(b) there will be no threat of compulsory measures in the event of non-appearance or refusal to give information;

(c) a person willing to give information will in no way be compelled to sign records or other written statements of information given orally;

2) The questioning will take place on the premises of an American consulate;

3) The person to be questioned will be afforded the opportunity to be accompanied by counsel.

Subsequently, in a further note of October 8, 1956 (J.S. App. 63a, 65a-66a), the FRG agreed, "on the condition of reciprocity, to visits by American investigating officers to non-Americans for the purpose of questioning within the meaning of the note verbale of January 13, 1956 * * * at the latter's homes and places of business, provided the persons to be questioned expressly request questioning to be conducted at their homes or places of business, or expressly consent to this form of questioning" (*id.* at 65a). The United States and the FRG agreed in 1980 that the original 1955-1956 exchange would continue to be regarded as valid notwithstanding the entry into force for the FRG of the Evidence Convention in June 1979 (J.S. App. 67a-71a).

b. The depositions ordered by the Michigan trial court are not authorized by the Exchange of Notes. The Exchange repeatedly and emphatically makes

clear that testimony will be voluntary and not compelled (see J.S. App. 64a, 70a). In contrast, the depositions ordered by the trial court are clearly compulsory. Although the order of October 7, 1980, provides that the Exchange of Notes "will control the course of the taking of these depositions" (*id.* at 24a), the order also provides "that deponents *shall* answer all questions promulgated (*ibid.*) (emphasis added). The August 17, 1982 order similarly requires appellant to produce the deponents in Germany on pain of "appropriate sanctions as will be determined by this Court" (*id.* at 7a).

Moreover, the Exchange of Notes applies only in the absence of a "specific request from the German authorities that such testimony not be taken" (J.S. App. 61a). In a letter dated June 25, 1982, from the German Ambassador to the United States to then Chief Judge Coleman of the Michigan Supreme Court (J.S. App. 72a-74a), and in more recent diplomatic notes from the German Embassy to the Department of State (App., *infra*, 1a-10a),[5] the FRG has made such a specific request.[6]

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[5] The orders in the instant case and in other cases (*e.g.*, *Volkswagenwerk, A.G.* v. *Superior Court, supra*) have resulted in strong written and oral diplomatic protests from the FRG. In May 1983, representatives of the FRG and the United States Department of State informally agreed that the FRG would continue to permit United States consular officers to take voluntary testimony from non-United States nationals in Germany for a limited time, pending further formal clarification of the Exchange of Notes. It was also agreed that the United States would notify the German Federal Ministry of Justice in advance of all intended evidence taking, so that the FRG would have the opportunity to exercise its right of veto in a given case.

[6] Since the FRG's protests are specifically directed at the Michigan trial court's orders, which the FRG considers in-

Because of the compulsory nature of the depositions ordered, and because of the specific objection of the FRG, the depositions are clearly unauthorized under the Exchange of Notes, and therefore are barred under the Evidence Convention. The Department of State accordingly intends to instruct United States consular officials in the FRG not to conduct the depositions as ordered by the trial court.

3. Because these instructions from the Department of State will preclude the taking of the depositions, review by this Court is not warranted at this time.[7] The October 7, 1980 order provides that the Exchange of Notes will "control the course of the taking of these depositions" (J.S. App. 24a), and appellees defend the trial court orders on the basis of the Exchange of Notes (Motion to Dismiss or Affirm 13-18). The Exchange of Notes deals only with the taking of evidence by consular officers (J.S. App. 61a, 64a). Thus, the refusal of the United States consul to participate will prevent the ordered depositions from taking place. The October 7, 1980 order in fact contemplates that appellees may "be unable to take said depositions because of the operation of German law or because of the opposition of the Federal Republic of Germany" (*id.* at 24a-25a). Because the depositions will not take place, no violation of German ju-

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herently compulsory, we cannot predict whether the FRG would object to the voluntary testimony of appellant's employees in the FRG in the absence of such orders. Furthermore, of course, the Evidence Convention machinery remains available to appellees.

[7] If the appeal is not otherwise dismissed for lack of jurisdiction (see note 1, *supra*), it should be dismissed on the ground that it does not present a substantial federal question at this stage of the litigation. For the same reason, the alternative petition for a writ of certiorari should be denied.

dicial sovereignty will result from the trial court orders at issue in this case.

It may be, of course, that the trial court will order sanctions against appellant on account of the failure of the depositions to take place. The August 17, 1982 order appears to contemplate such sanctions. The imposition of such sanctions on a private litigant on the ground that government officials refuse to preside over the taking of depositions may itself result in a violation of the Evidence Convention, but whether it does so is an issue that has not been addressed by the Michigan courts in this case. Because no sanctions have yet been imposed, review of the issue at this stage would be premature. See *NAACP* v. *Williams*, 359 U.S. 550 (1959); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948).

CONCLUSION

The appeal should be dismissed, and the alternative petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

APPENDIX

P83 0140-1185

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and, referring to its previous discussions with the Department concerning the Falzon vs. Volkswagen case, has the honor to request once again the Department's assistance in the same matter.

It has been brought to the Embassy's attention that the Falzon vs. Volkswagen case is pending on appeal before the United States Supreme Court.

The Embassy transmits herewith copies of

—a letter of the Ambassador of the Federal Republic of Germany of June 25, 1982, addressed to Judge Mary S. Coleman, Supreme Court of the State of Michigan,[*]

—the Embassy's note verbale of August 20, 1982,

—a note verbale dated April 28, 1983, addressed by the German Federal Foreign Office to the United States Embassy in Bonn.

The Embassy wishes to confirm that these documents state the position of the Government of the Federal Republic of Germany and would be very grateful to the Department for bringing them to the attention of the United States Supreme Court.

At the same time, the Embassy refers to the discussions held in Washington on May 31, 1983, be-

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* This letter is reproduced at J.S. App. 72a-74a.

tween officers of the German Federal Foreign Office and the Federal Ministry of Justice and officers of the US Department of State and the US Department of Justice, in which an understanding was reached on further measures to be taken with a view to facilitating the taking of evidence on a voluntary basis and to improving mutual assistance under the Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil and Commercial matters.

In this context, the Embassy wishes to reiterate that it remains the formal position of the government of the Federal Republic of Germany that evidence for use in civil matters pending in the United States which is not given by German citizens on a strictly voluntary basis, may only be obtained in the Federal Republic of Germany through the channels authorized by and in accordance with the provisions of the Hague Evidence Convention.

Washington, D.C., November 7, 1983

Department of State
Washington, D.C.

[SEAL]

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to request assistance of the Department in the following international legal matter:

In the cases of Falzon vs. Home Insurance Co., Civ. Action No. 77, 722, 371 NP and Falzon vs. Volkswagen of America, Inc., Civil Action No. 78, 803, 043 NP an order has been issued from the Circuit Court, Wayne County, State of Michigan, on Tuesday, August 17, 1982 that depositions of twelve German citizens proceed in Wolfsburg, Federal Republic of Germany.

Plaintiff's attorney intends to travel to Germany this weekend to proceed with the depositions on August 24. A similar order previously issued in this case is presently on appeal at the Michigan Supreme Court and an application for stay of the latest order was made yesterday at the Michigan Supreme Court.

The order impinges upon the territorial sovereignty of the Federal Republic of Germany. The position of the Federal Republic of Germany has been communicated to the Michigan Supreme Court by letter attached hereto.

It is particularly distressing that such attempt to take depositions in the Federal Republic of Germany is not been made in accordance with procedures of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters to which both the United States and the Federal Republic of Germany are parties.

The Embassy of the Federal Republic of Germany would appreciate if the United States Government could intervene with the Michigan Supreme Court supporting the granting of stay permitting for argument to be presented in this matter to avoid acts inconsistent with the Hague Convention and the position of the German Government.

Washington, D.C., August 20, 1982

Department of State
Washington, D.C.

DOPPEL

AUSWÄRTIGES AMT
512-521.60 USA

Verbalnote

Das Auswärtige Amt beehrt sich, der Botschaft der Vereinigten Staaten von Amerika folgendes mitzuteilen:

In dem bei dem Supreme Court of the State of Michigan anhängigen Verfahren Falzon et al. vs. Volkswagen of America Inc. et al., Docket No. 69595 & 69596, hat die Volkswagenwerk Aktiengesellschaft (VW AG) in Wolfsburg das Auswärtige Amt und das Bundesministerium der Justiz davon unterrichtet, daß auf Grund einer Notice of Deposition beabsichtigt sei, im Generalkonsulat der Vereinigten Staaten von Amerika in Hamburg oder Frankfurt/Main am 02. Mai 1983 zehn Mitarbeiter der VW AG durch einen Anwalt der Kläger unter Eid vernehmen zu lassen.

Das Auswärtige Amt beehrt sich, die diesbezügliche Rechtslage wie folgt darzulegen:

Zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika ist das Haager Übereinkommen vom 18. März 1970 in Kraft getreten (BGBl. 1977 II S. 1452, Bkm. vom 21. Juni 1979, BGBl. II S. 780 und vom 05. September 1980, BGBl. II S. 1290). Nach Artikel 17 des Übereinkommens darf von dem Beauftragten des Gerichts eines Vertragsstaates in einem anderen Vertragsstaat

....

An die
Botschaft der
Vereinigten Staaten von Amerika

eine Beweisaufnahme, insbesondere also auch eine eidliche oder uneidliche Vernehmung von Zeugen, nur vorgenommen werden, wenn dieser andere Vertragsstaat zuvor die Genehmigung dazu erteilt. In Abschnitt B Nr. 4 der Erklärung, welche die Bundesrepublik Deutschland bei der Hinterlegung der Ratifikationsurkunde abgegeben hat, ist diese Rechtslage nochmals ausdrücklich bekräftigt worden (s. Bkm. vom 21. Juni 1979); ebenso in § 12 Abs. 1 des Ausführungsgesetzes vom 22. Dezember 1977 (BGBl. I S. 3105).

Die Zentralen Behörden der deutschen Bundesländer, die nach den innerdeutschen Ausführungsvorschriften für die Genehmigung von Beweisaufnahmen zuständig sind, erteilen derartige Genehmigungen jedoch nicht, wenn deutsche Staatsangehörige (Angehörige deutscher Firmen) als Zeugen, sei es eidlich oder uneidlich, vernommen werden sollen, da ihnen die Schutzgarantien des deutschen Verfahrensrechts erhalten bleiben müssen. Dementsprechend heißt es auch in § 11 des Ausführungsgesetzes: "Eine Beweisaufnahme durch diplomatische oder konsularische Vertreter ist unzulässig, wenn sie deutsche Staatsangeörige betrifft." Hierin spiegelt sich der erwähnte Schutzgedanke wider, der uneingeschränkt auch bei Beweisaufnahmen, die durch den Beauftragten des Gerichts eines anderen Vertragsstaates vorgenommen werden sollen, von den Zentralen Behörden der Bundesländer praktiziert wird.

Die von dem US-Gericht angeordnete Zeugenvernehmung kann deshalb nur im Wege der Rechtshilfe durch ein deutsches Gericht vorgenommen werden. Die Anwälte der Parteien können bei der Vernehmung anwesend sein und Fragen stellen, soweit sie nach deutschem Verfahrensrecht zulässig sind;

hierüber entscheidet der vernehmende Richter. Die Vernehmung kann mit einem Tonbandgerät aufgenommen werden; das Tonband kann dem ersuchenden Gericht zur Verfügung gestellt werden. Mitglieder des ersuchenden ausländischen Gerichts können bei der Vernehmung durch das zuständige deutsche Amtsgericht zugegen sein, wenn die Zentrale Behörde dies genehmigt hat. Mit diesen Regelungen ist hinreichend sichergestellt, daß sich die Zeugen zu dem Beweisthema umfassend äußern. Auf Wunsch des ersuchenden Gerichts erfolgt die Vernehmung unter Eid (Art. 3 Abs. 2 Buchst. h des Übereinkommens.)

Das Auswärtige Amt geht daher davon aus, daß die vorgesehene Vernehmung in der beabsichtigten Form nicht stattfinden wird und stellt dem Supreme Court of the State of Michigan anheim, eine etwa noch beabsichtigte Vernemung nach dem Haager Übereinkommen über die zuständige deutsche Zentrale Behörde, nämlich den Niedersächsischen Minister der Justiz, D-3000 Hannover, beim Amtsgericht in Wolfsburg zu beantragen.

Das Auswärtige Amt benutzt diesen Anlaß, die Botschaft der Vereinigten Staaten von Amerika erneut seiner ausgezeichneten Hochachtung zu versichern.

Bonn, den 28. April 1983

L.S.

INFORMAL TRANSLATION OF GERMAN FEDERAL FOREIGN OFFICE NOTE VERBALE OF APRIL 28, 1983 TO THE AMERICAN EMBASSY, BONN

The foreign office has the honor to inform the Embassy of the United States of America of the following:

In the proceeding entitled Falzon et al. vs. Volkswagen of America Inc. et al., Docket No. 69595 and 69596, which is pending before the Supreme Court of the State of Michigan, Volkswagenwerk AG in Wolfsburg has informed the Foreign Office and the Federal Ministry of Justice that it is intended, on the basis of a notice of deposition, that a lawyer of the plaintiffs should depose 10 employees of VWAG under oath in the Consulate General of the United States of America in Hamburg or Frankfurt/Main on May 2, 1983.

The Foreign Office has the honor to set forth the legal situation in regard to this matter:

The Hague convention of March 18, 1970, has entered into force between the Federal Republic of Germany and the United States of America. Under Article 17 of the Convention Evidence may be taken (Beweisaufnahme) by a Commissioner of a Court of One State Party in another State Party, including in particular a deposition of witnesses (Vernehmung) under oath or not under oath, only if the other State Party has previously given its consent. In paragraph B(4) of the declaration which the Federal Republic of Germany made upon deposit of the instrument of

ratification, this legal situation was again expressly confirmed.

The Central Authorities of the German Federal states, which under domestic implementing regulations are responsible for granting permission for the taking of evidence, do not grant such permission where German Nationals (members of German firms) are to be deposed as witnesses, whether under oath or not, since the protection of German procedural law must be guaranteed to them. Accordingly, section 11 of the implementation law reads: "The taking of evidence by diplomatic or consular representatives is not permissible where German Nationals are concerned." This provision reflects the aforementioned concept of protection, which is practiced by the Central Authorities of the Federal states without reservation, even with respect to the taking of evidence by a Commissioner of a Court of Another State Party.

The deposition of witnesses which has been ordered by the U.S. Court can, therefore, be undertaken only by a German Court through the judicial assistance channel. The lawyers of the parties can be present at the deposition and ask questions, insofar as they are permissible under German procedural law; the deposing judge decides such matters. The deposition can be tape-recorded and the tape made available to the requesting court. Members of the requesting foreign court can be present at the deposition by the Competent German District Court, if the central authority so permits. These regulations sufficiently ensure that the witnesses address the subject matter of the proceeding comprehensively. If the requesting court so desires, the deposition can take place under oath (Art. 3, Para. 2(H) of the Convention).

The Foreign Office thus proceeds on the basis that the planned deposition will not take place in the manner intended, and it leaves it to the Supreme Court of the State of Michigan to make application for any future deposition with the District Court in Wolfsburg through the Competent German Central Authority, namely the Ministry of Justice of Lower Saxony, D-3000 Hannover, in accordance with the Hague Convention.

(Complimentary closing).

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NO. 82-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,
Appellant,

vs.

JOSEPH and BARBARA J. FALZON, Individually and as Next Friend of JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON and RAMON FALZON, minors,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANT'S REPLY BRIEF TO A BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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I.
THE UNITED STATES UNDERSTANDING OF THE HAGUE CONVENTION AND THE NOTES VERBALES

The Brief of the United States unequivocally concludes that the orders of the Michigan trial court compelling depositions of German nationals in Germany are invalid and unauthorized under the Hague Convention and the Notes Verbales. These official representations — on matters of State and concerning international compacts — must be afforded deference[1]. Appellant is in accord with the Solicitor General as to these proposi-

[1] *Sumitomo Shoji America, Inc.* v *Avagliano*, 457 US 176, 184-85 (1982); *Kolovrat* v *Oregon*, 366 US 187, 194 (1961); *Factor* v *Laubenheimer*, 290 US 276, 295 (1933); *Sullivan* v *Kidd*, 254 US 433, 442 (1921); *Charlton* v *Kelly*, 229 US 447, 468 (1913).

tions. However, Appellant must dispute certain points made by the Solicitor General concerning judicial matters that are outside the executive ken.

II.
JURISDICTION AND "JUSTICABILITY"
A.
MOOTNESS AND RIPENESS

First, the United States, although not specifically articulating it as such, argues that this appeal is either moot, or not ripe for adjudication, or both; predicating such argument upon the following unspoken (and false) syllogism.

The trial court orders require enforcement by officers of the State Department; since this matter has come before the Court, the State Department has determined that in the future it will instruct Consular Officers in the Federal Republic of Germany not to conduct the ordered depositions; therefore, as the depositions cannot go forward before the officers, no danger to German sovereignty exists and the question presented is now insubstantial or nonexistent.

This understanding of mootness and insubstantiality is unsupported by any decision of this Court. The controversy between the parties is still very much alive, as are the state court orders. What the State Department submits it is going to do, or may do in the future alters neither.

Certainly, on the face of the Michigan orders there is no conclusive assurance that the State Department's future non-cooperation effectively moots this controversy. The Order of October 7, 1980, appears to contemplate American-style depositions by attorneys (and not questioning by U.S. Consular officials), except for the implied reference to consular officials which can be read into the provision that "the notes verbales will control the *course* of the taking of these depositions." (See Appendix 24a; emphasis added). In light of the repeated reference to *depositions* and the scheduling of same "at a time mutually convenient for both plaintiffs' and defendant's counsel,"

without any mention of consular officials, there is real doubt that the Wayne County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court considered the U.S. Consulate to be a necessary participant in the proceedings. Again, the Wayne County Circuit Court Order of August 17, 1982 (Appendix 7a) directs the deponent to appear for *depositions* (not Consular questioning) in Wolfsburg, Germany, where there is no consular office. This August 17, 1982, Order is also the Order which threatens "appropriate sanctions" for failure to appear.

Even assuming that the State Department's laudable position is in fact implemented, no principle of law permits or empowers the State Department to set aside or vacate a state court order. The only effect of this Court's adopting the suggestion of the Solicitor General to dismiss the appeal — particularly in view of his own interpretation of the orders as vividly violative of the treaty and notes — would be to leave extant patently unlawful and unconstitutional orders. Indeed, merely because the State Department elects not to cooperate in enforcing these otherwise viable orders, does not mean they would be invalid or unenforceable. To the contrary, absent this Court's reversal, the orders continue to be valid, to be the law of the case and to be enforceable by the Michigan Courts. Certainly, the Solicitor General recognized this when he alluded to the threat of sanctions. *Amicus Curiae Brief* at 12. Such enforcement of still viable orders, absent intervention and invalidation by this Court, demonstrates conclusively that this matter is neither moot nor insubstantial, *FTC* v *Goodyear Tire & Rubber Co.*, 304 US 257, 259-60 (1938),[2] and requires the

[2]In *Goodyear*, this Court rejected a mootness challenge predicated upon discontinuance of a practice the FTC has ruled violated the Clayton Act, because, *inter alia*, the FTC's order was continuing, and absent review by this Court, the respondent could be subject to enforcement proceedings for disobeying that otherwise valid order. *See also Pennsylvania* v *Mimms*, 434 US 106, 108 n.3 (1977) (possibility of "collateral legal consequences" renders claim proper to be reviewed on the merits and not moot).

appeal be taken and the orders vacated.[3]

Correlatively, the Solicitor General's allusion to the absence of ripeness is as equally baffling and misplaced as are the mootness contentions. Surely, the anticipated actions of non-litigants cannot serve as a bar to justicability. Moreover, the threat of enforcement of the Orders by the Michigan Courts establishes, *a priori,* the ripeness of the controversy.[4]

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[3]The Solicitor General argues (*Amicus Brief* at 12) that because no sanctions have been imposed by the trial court, this somehow inhibits review of the underlying orders admittedly invalid. Appellant knows of no proposition in law to support this contention — the *FTC* v *Goodyear Tire & Rubber Co.*, 304 US 257, case, for example, being to the contrary — and the cases cited are inapposite. *NAACP* v *Williams*, 359 US 550 (1959) involved an attempt to review by *certiorari* a contempt order, which by its own terms, was not final since the Georgia court explicitly reserved the power to reduce the amount of the fine. *Id.* at 551 (Douglas, J., concurring). The orders involved in this case, mandating that the depositions go forward in Germany, are final by their own terms. *See* J. S. at 2-3 n. 1 and Appellant's Brief in Opposition to Motion to Dismiss/Affirm at 5-7. Indeed, the Solicitor General does *not* dispute this, as he concedes *certiorari* jurisdiction. *Amicus Brief* at 3 n.1.

Similarly, in *Republic Nat. Gas. Co.* v *Oklahoma*, 334 US 62 (1948), the Court refused to review a state court order affirming an administrative agency ruling requiring Appellant to do business with a certain company but which, by its own terms, retained jurisdiction and left open the question of the terms and conditions of the Appellant's interactions with that company. By contrast, Judge Farmer's command (sustained by the Michigan Court of Appeals and the Michigan Supreme Court) that the depositions go forward on a compulsory basis is self-contained and internally final. The mere fact that sanctions are mentioned in the August 17, 1982 order (and nothing is said about sanctions in the order of October 7, 1980) does not somehow transform a final order or judgment into a non-final one. Every Court has the inherent authority to enforce its own orders absent a stay or reversal from a reviewing authority. The very fact that the trial court can impose sanctions for failure to comply with this unconstitutional order, clearly signals the need for this Court to vacate the order — as opposed to giving the Court a reason to refrain from hearing this appeal.

[4]*Lake Carriers' Ass'n* v *MacMullan*, 406 US 498, 508 n. 12 (1972); *Pierce* v *Society of Sisters*, 268 US 510, 535-36 (1925). *See also* Comment, *Threat of Enforcement-Prerequisite of a Justicable Controversy*, 62 Colum. L. Rev. 106 (1962); P. Bator, D. Shapiro, P. Mishkin, H. Wechsler, *The Federal Courts & The Federal System* 141-142 (2d. ed. 1973).

B.
§1257(2) JURISDICTION

Appellant vigorously contests the Solicitor General's argument that this matter is not properly before the Court on appeal under 28 USC §1257(2). Indeed, the United States does *not* dispute that the orders appealed from are final; rather it concedes the Court has *certiorari* jurisdiction under 28 USC §1257(3). *Amicus Brief* at 3 n.1. The Solicitor General then suggests that the Court dismiss the appeal because, it is contended, the Appellant never explicitly challenged, in the state courts, the validity of the Michigan Court Rules as applied. *Amicus Brief* at 3-4 n.1.

Certainly, *as a matter of fact,* this is not correct. As the Appellant has already noted (Appellant's Reply Brief Opposing Appellee's Motion to Dismiss or Affirm at 2,8), the trial court, in certifying an intra-state appeal, recognized that application of GCR 1963, 304.2 — which mandates local procedures for taking extra-territorial depositions — was expressly being challenged as invalid and violative of the Hague Evidence Convention.[5] In Michigan, the procedures for the taking of

[5]In certifying the appeal, the trial court characterized some of the questions as follows:

"1. Whether a Michigan Circuit Court Judge that has undisputed jurisdiction over the parties and subject matter can order defendant's (VWAG) employees or its former employees to submit to depositions in Germany, under oath and *in accordance with Michigan Practice and Procedure* (GCR 304.2) and Notes Verbales of 1955?

2. And whether or not the taking of *such* discovery depositions *would violate the Hague Treaty* (28 USC §1781), or is obtaining of such information and disclosures confined to Letters Rogatory?"

J. S. App. at 22a (emphasis supplied).

Also, in that certificate, the trial court expressly characterized the position of the Appellant as one challenging application of the Michigan General Court Rules when they were in conflict with international law, which of course, encompasses bilateral and international treaties:

"On August 13, 1980, defendant-appellant filed its reply to the plaintiffs-appellees' Memorandum and asserted the following:

. . . III. The Michigan General Court Rules control the course of discovery in the case at bar, *as long as the rules do not conflict with international law.*"

J. S. App. at 15a (emphasis supplied). *See also Whitfield* v *Ohio,* 297 US 431, 435-36 (1936).

depositions are governed *solely* by the Michigan General Court Rules,[6] as the references to the record demonstrate. At every stage of the proceedings,[7] Appellant explicitly claimed the Rules to be invalid, as applied. The following illustrative contention made before the Supreme Court of Michigan establishes this beyond peradventure:

> "[W]hile it is true that procedures governing the taking of discovery are matters within state control, to the extent that such procedures are inconsistent with the Hague Convention, they are invalid."[8]

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[6]*See, e.g., Seaton* v *State Farm Ins. Co.*, 75 Mich. App. 252, 257-58 & n. 1; 254 N.W.2d 858, 860-61 & n. 1 (1977). *See also* 2 J. Honigman & C. Hawkins, *Michigan Court Rules Annotated* Rule 302.1, at 26-29 (2d ed. 1963).

[7]In further demonstration of the fact that the validity of Michigan Court Rules, as applied, was explicitly challenged, one need only peruse the questions presented by the Appellant in its papers seeking leave to appeal in the Michigan Court of Appeals. Two sub-parts (A & H) of but one of the several questions (No. 5) is illustrative:

> "5. That the questions presented in this appeal are of first impression and are of major legal significance to the jurisprudence of the State of Michigan, the jurisprudence of the United States, the International Legal Community, and the 'International Law of Nations' as follows:
>
> A). Whether a Michigan Circuit Judge may properly order, *in contravention of an existing treaty* (The Hague Convention), that depositions of twelve German nationals be conducted in Germany in accordance with *Michigan procedures*, which procedures are *materially inconsistent with the express provisions* for taking evidence abroad as set forth *in such Treaty?*
>
> . . .
>
> H). Whether the Order appealed from is improperly vague and ambiguous in that it states that ". . . *Michigan General Court Rules* control these proceedings as much as possible . . ." then further states that ". . . Notes Verbales of 1955 will control the course of the taking of these depositions," which contain provisions which *are inconsistent with* each other and which further ignores the applicable provisions of *the Hague Convention on The Taking of Evidence Abroad?*"

Record, Applications for Leave to Appeal to Michigan Court of Appeals dated December 26, 1980 at 3-4, March 13, 1982 at 3-4.

[8]Record, Brief in Support of Emergency Application for Leave to Appeal to the Supreme Court of Michigan dated June 7, 1982 at 3-4. (emphasis supplied)

Moreover, it is respectfully suggested that the Solicitor General reads, far too sensitively, *Richmond Newspapers, Inc.* v. *Virginia,* 448 US 555, 562-63 n.4 (1980) (plurality opinion); *Hanson* v. *Denkla,* 357 US 235, 244 & n.4 (1958); and *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson,* 324 US 182, 185-87 (1945). For the Court to adopt and apply such a reading of those cases to the matter at bar would be to impose upon §1257(2) a semantic gloss requiring artificial recitation of magic phrases — a complete triumph of form over substance.[9] *See,* 16 Wright, Miller, Cooper & Gressman, *Federal Practice & Procedure: Jurisdiction* §4013, at 273 n.53 (Cumm. Supp. 1982). The requirement of challenge to the validity of a state law need not take on a specified form, as the United States suggests, and the decisions of this Court verify this diversity of means of challenge. *E.g., Pruneyard Shopping Center* v *Robins,* 447 US 74, 79-80 (1980); *Gomez* v *Perez,* 409 US 535, 537 & n.2 (1973); *Saltonstall* v *Saltonstall,* 276 US 260, 267-68 (1928). As the federal challenge to the application of the California ad valorem property tax — mandated by statute — in *Japan Line, Ltd.* v *City of Los Angeles,* 441 US 434, 440 (1979) was "squarely made" for §1257(2) purposes, Appellant's federal challenge to application of Michigan discovery procedures — mandated by Court Rules — was "squarely made" (and the validity of those rules was just as "squarely sustained" by the Michigan Courts), notwithstanding the Solicitor General's "unpersuasive recharacterization." *See, id.* at 440-41.

---

[9]Similarly, the contention of the United States is misplaced that "[t]his case, like virtually every case," involves the State Court's application of its rules, somehow does not involve a challenge to the validity of a state "statute" within the meaning of § 1257(2). This overlooks the repeated construction of § 1257(2) to include Court Rules within the definition of "statute". *E.g., Ohralik* v *Ohio State Bar Ass'n,* 436 US 447 (1978); *In Re Primus,* 436 US 412 (1978); *Bates* v *State Bar of Arizona,* 433 US 350 (1977); *In Re Griffiths,* 413 US 717 (1973); *Mayer* v *City of Chicago,* 404 US 189 (1971).

III.
THE ALTERNATIVE PETITION FOR CERTIORARI

Appellant alternatively urges that this Court is empowered to consider the papers as a petition for *certiorari*. 28 USC §2103. The grounds for such review are compelling. An important question is squarely before the Court. How should a multinational treaty — adopted to ease or eliminate friction between countries having very different legal systems and views about pre-trial discovery — be interpreted and implemented by the Courts of the United States and the several states? The record on this issue could not be more clear or complete. The Court not only knows, and has before it the views of the litigants and the state courts, but that of both contracting states — *i.e.* the United States and the Federal Republic of Germany. The matter is conspiciously ripe for determination.

The question is also of manifest concern to litigants and courts — state and federal — throughout the country since they must daily define proper parameters to extraterritorial discovery efforts. Inconsistent interpretations[10] presently abound. Unless those differing views are authoritatively corrected and harmonized by this Court, multiple applications for stays and for plenary consideration must surely increase. Indeed, the Supreme Court of Michigan has consistently refused to budge from its position, notwithstanding this

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[10]*Compare, e.g.*, the Michigan Courts' parochialized view as expressed by the state trial judge in the orders appealed from J.S. at 7a-8a, 24a-25a, *with*, the recently articulated position of the Third Circuit concerning related matters in *Feliciano* v *Reliant Tooling Co.*, 691 F.2d 653, 657-58 (3d Cir. 1982). *See also* the pending Jurisdictional Statement and related papers in *Club Mediterranee S.A.* v *Dorin, appeal filed*, 52 U.S.L.W. 3210 (U.S. Sept. 16, 1983) (No. 83-461) (Stay entered July 21, 1983, O.T. 1982, No. A-28). *See also Wilson* v *Stillman & Hoag, Inc.*, ___ Misc. 2d ___; 467 N.Y.S. 2d 764 (N.Y. Sup. Ct. 1983); *Schroeder* v *Lufthansa German Airlines*, 18 Aviation Cases (CCH) 17,222 (N.D. Ill. Sept. 15, 1983); and *Lasky* v *Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

Court's having twice granted extraordinary relief.[11] (Nor is there any demonstrable reason to suggest that the Michigan Supreme Court will treat the State Department's expressed intention to act with any greater deference than it did THE CHIEF JUSTICE'S and JUSTICE O'CONNOR'S invitations to resolve this issue).

CONCLUSION

The Solicitor General's conclusion that the state court orders plainly and unconstitutionally violate the Hague Convention is reason enough for this Court to grant relief. His implication, however, that this Court's caseload may preclude review of this matter is ill-advised. It must be remembered that this case would never have reached this Court, if *any* of the Courts of Michigan had performed their fundamental obligation under our social compact to enforce the Constitution, treaties and laws of the United States.[12] The fact remains that they did not perform those basic tasks within their charge and, given this record, there is no indication that they will ever voluntarily do so. Moreover, as demonstrated by this matter and yet another presently pending in this Court (*Club Mediterranee, S.A.* v *Dorin*, No. 83-461. [Stay by THE CHIEF JUSTICE, O.T. 1982, No. A-28]), as well as the conflicting holdings of courts throughout the country, this issue is most likely to recur; resulting in multiple appeals, increased applications for stay and further intrusions upon this Court's time.

---

[11]J. S. at 1a-2a, where the Supreme Court of Michigan refused to hear the appeal from Judge Farmer's Orders *after* THE CHIEF JUSTICE had stayed the depositions, J. S. at 30a-31a. *See also* Record, May 19, 1983 Order of Supreme Court of Michigan refusing to stay proceedings pending appeal to this Court *after* JUSTICE O'CONNOR had entered a second stay, but which — out of deference to the Justices on that Court — was only to be operative until they acted upon the stay before them. J. S. at 31a-34a. This necessitated entry of yet another stay by JUSTICE O'CONNOR pending this Court's disposition of the appeal. *Volkswagenwerk A.G.* v *Falzon*, No. A-956 (82-1888), O.T. 1982 (Order of May 26, 1983).

[12]U.S. Const. Art. VI, cl. 2. *See, e.g., Testa* v *Katt*, 330 US 386, 393 (1947); *Minneapolis & St. L.R.R.* v *Bombolis*, 241 US 211, 222 (1916); *Clafin* v *Houseman*, 93 US 130, 137 (1876).

Certainly, now that the two governments involved have unequivocally spoken and in view of the clarity of the record herein, this matter can be expeditiously remedied through summary reversal under Rule 16.7 without inordinate consumption of the Court's time. In no event, however, should the refusal of the Michigan Courts to give force and effect to an extant treaty and other diplomatic obligations of the United States, and the corollary elevation of Michigan Court Rules above those obligations, be either approved or condoned — if even by abstention — given that the primary rationale underlying Congress' mandate that this Court assume obligatory jurisdiction under 28 USC §1257(2) is the specific inhibition of just such state action. *See, John P. King Mfg. Co.* v *City Council of Augusta,* 277 US 100, 103-04 (1928). 16 Wright, Miller, Cooper & Gressman, *Federal Practice & Procedure: Jurisdiction* §4012, at 603-605 (1977).

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